Supreme Court, U.S.
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No. _____

In The

SUPREME COURT OF THE UNITED STATES

GREG RUTHERFORD, Butte County Sheriff's Deputy, MICK GREY, Butte County Sheriff, and COUNTY OF BUTTE,
Petitioners,

vs.

RICHARD LEO DEORLE
Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Whether, in an alleged use of excessive force case, a peace officer who fires a beanbag round, in accordance with his training and accepted police standards, at an intoxicated out of control suspect who was known to have threatened to kill officers while in possession of a board with nails, roofing hatchets and a crossbow pistol and who suddenly advances toward the officer threatening to physically assault him while holding a container of lighter of fluid is acting objectively reasonable under the Fourth Amendment.

2) Whether, in an alleged use of excessive force case, a peace officer is entitled to qualified immunity when the undisputed facts show the officer's conduct did not violate a constitutional right.

3) Whether, in an alleged use of excessive force case involving non-deadly force, a peace officer should be required to provide a warning, if feasible, to the suspect.

4) Whether, in the application of qualified immunity to an alleged use of excessive force case, the standard for what constitutes clearly established law requires that there be factually analogous case law consistent with the opinion of this Court in Saucier v. Katz, 533 U.S. 194 (2001) and other Circuit Courts of Appeal or that no prior case prohibiting the use of force under these circumstances is required as determined by the Ninth Circuit in this case.

5) Whether, a peace officer involved in an alleged use of excessive force is entitled to qualified immunity when a reasonable officer could not have known he may be violating the law due to an unsettled legal standard and

where there is no case law precedent defining application of the legal standard.

List of Parties

All of the parties to this proceeding are listed in the caption.

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Opinions Below

The Second Amended Opinion of the Court of Appeals for the Ninth Circuit is reported at 272 F.3d 1272, and is reprinted in the Appendix hereto, pp. 1-24. Also reprinted in the Appendix is the First Amended Opinion at pp. 25-46, and the Original Opinion at pp. 47-65.

The memorandum order of the United States District Court for the Eastern District of California granting summary judgment in this case has not been reported. It is reprinted in the Appendix hereto, pp. 68-75 and the Order denying Plaintiff's Motion for Reconsideration is reprinted in the Appendix hereto, pp. 66-67.

Jurisdiction

On November 19, 2001, the Ninth Circuit Court of Appeals filed its Second Amended Opinion and an order denying Petitioner's Amended Petition for Rehearing and Suggestion for Rehearing En Banc.

The Jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS IN ISSUE

Fourth Amendment To The United States Constitution

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

A. Facts Giving Rise To This Case

On September 9, 1996, Richard Deorle was intoxicated, agitated and acting out of control while at his home in Butte County, California. E.R. 107-108. Both Deorle and his wife characterize Deorle as having lost control of himself. Supp. E.R. 312-313; Supp. E.R. 137. Deorle's wife, Ronda, called 911 at approximately 4:00 p.m. E.R. 107. In response, Deorle told her that the police would have to come and kill him. Supp. E.R. 122. Butte County Deputy Sheriff George Mahon, responded to the scene, heard screaming from inside the residence and found the situation to be sufficiently volatile that he immediately placed a call for Code 3 (urgent) backup. Supp. E.R. 380.

Deputy Mahon was able to remove Mrs. Deorle and the children to his patrol unit located in the driveway of the residence. Supp. E.R. 380. As he began speaking with Mrs. Deorle, Deputy Mahon was confronted by Deorle who was holding a large two by six inch board with nails protruding from the end of it. Id. Deputy Mahon drew his gun and ordered Deorle to put the board down, which Deorle eventually did. Id. As Deputy Mahon continued speaking with Mrs. Deorle, however, Deorle then picked up two roofing hatchets, one in each hand. Id.

Mrs. Deorle advised Deputy Mahon that Deorle was upset at previously being diagnosed with Hepatitis C and had started drinking alcohol earlier that day. E.R. 180; Supp. E.R. 380. She believed and informed Deputy Mahon that the alcohol mixed with his medication for Hepatitis C was causing the rage he was exhibiting.[1] Id. Deputy Mahon was also informed that Deorle had been previously arrested for assaulting his wife and had been on probation. Id.

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[1] The blood alcohol test later performed on Deorle revealed that he had a .177 percent blood alcohol level. E.R. 196.

A number of deputies and officers from both the Butte County Sheriff's Department and the Paradise Police Department subsequently arrived at the scene. See Supp. E.R. 60-61. The deputies set up roadblocks in this residential area at the nearby intersections of Creston and Skyway and Creston and Sherwood Roads. Supp. E.R. 34; Supp. E.R. 174-76 (diagram of scene). Deputies observed Deorle wander around his property, including being up on the roof of his residence. Deorle approached several deputies at the roadblock at Sherwood and Creston Roads three or four times, yelling at them and threatening them while holding a hatchet in one hand and a metal crossbow pistol in the other hand. Supp. E.R. 52-53; Supp. E.R. 156-61. Deorle challenged to take on all of the deputies one at one time and for them to kill him. Supp. E.R. 52-53; Supp. E.R. 156-61; Supp. E.R. 385. Deorle approached another deputy, who had positioned himself on Creston Road across from Deorle's residence, and pointed the loaded crossbow at him. Supp. E.R. 158; Supp. E.R. 385. Deorle also threatened that he would kill anyone who came on his property. Supp. E.R. 34. Throughout these events, deputies instructed Deorle to drop his weapons and surrender, but Deorle resisted all of the attempts to detain him peacefully. Supp. E.R. 158; Supp. E.R. 385.

Deputy Greg Rutherford was specifically called to the scene because he was trained in the use of the non-lethal beanbag round and was the leader of the Special Incident Response Team ("SIRT"). Deposition of Deputy Rutherford at p. 29; Supp. E.R. 320-21. Deputy Rutherford had been trained in the use of non-lethal weapons and that the appropriate and intended use of the beanbag rounds included confrontations with suicidal persons or persons that are violent or hostile and threatening injury or death to themselves, officers or others. Supp. E.R. 320; Depo. of Rutherford at p. 53. Rutherford also knew from his training that the device was intended to enable the application of force with less potential for causing death or serious physical injury than conventional police tactics. Supp. E.R. 320, 322. The beanbag round is designed to knock down a person in order to protect the

safety of the officers or civilians. Id.; Depo. of Rutherford at p. 53. The training included instruction that the appropriate distance for the use of the device was between twenty to forty feet, directed at the center mass of the target. Supp. E.R. 320, 322.

While en route to the scene, Rutherford was monitoring radio traffic and heard yelling, screaming, that Deorle was out of control, and was brandishing hatchets and a crossbow. E.R. 109; Supp. E.R. 321; Supp. E.R. 62. Upon arriving at the scene, Rutherford was told that Deorle had been involved in a violent domestic situation, had threatened officers with a board with nails sticking out of it, had threatened officers with roofing hammers or hatchets, and threatened officers with a crossbow. Supp. E.R. 321; Supp. E.R. 62-63; Depo. of Rutherford at pp. 30-31. Rutherford was also told that Deorle was under the influence of alcohol and possibly had controlled substances and medication in his system, and Deorle had recently been informed he had some type of possibly lethal disease. Id. Deputy Rutherford was further advised that a neighbor was still at home and the perimeter was not secure, as virtually no one was behind Deorle's home. Supp. E.R. 63; Depo of Rutherford at p. 36. Deputy Rutherford then observed Deorle walking around the neighborhood yelling and screaming. Supp. E.R. 63; E.R. 142.

Deorle returned to the area near the road block at Creston and Sherwood Roads now armed with the crossbow and a container of charcoal lighter fluid. Supp. E.R. 321; Supp. E.R. 63. At that point Deputy Rutherford and Lieutenant Nichols of the Paradise Police Department went to survey the area around Deorle's residence in order to brief the rest of the SIRT team and prepare a diagram of the area. Supp. E.R. 321; Supp. E.R. 63; Depo. of Rutherford at pp. 35-36. Deputy Rutherford did not go onto Deorle's property with the intent of deploying the beanbag round. Depo of Rutherford at pp. 49-51.

Deorle apparently spotted them and returned to the area around his driveway, still in possession of the crossbow and the can of lighter fluid. Supp. E.R. 321-22; Supp. E.R. 63-64. Deputy

Rutherford took cover behind a tree in the front yard of the residence directly next door to the Deorle residence, approximately forty feet away from Deorle, and Lieutenant Nichols took position of cover a few feet behind Rutherford. Supp. E.R. 63, 174-76. Deputy Rutherford could not see whether the crossbow was loaded with an arrow but assumed that it was. Supp. E.R. 63; Depo. of Rutherford at pp. 60-61.[2]

Several minutes passed as Deorle stood approximately forty feet away threatening Rutherford with physical harm and generally taunting Rutherford to shoot him. E.R. 109; Supp. E.R. 63-64; Depo. of Rutherford at pp. 44-45. Deputy Rutherford ordered Deorle to put down his weapons. Supp. E.R. 322; Supp. E.R. 390; Supp. E.R. 35. Deputy Rutherford aimed his shotgun loaded with the beanbag round at Deorle and Deorle saw the gun pointed at him. Supp. E.R. 322; Depo of Rutherford at pp. 96-97; Depo. of Richard Deorle at p. 86. Deputy Rutherford felt that if Deorle reached a point of about thirty feet from him, he and others in the area would be put in jeopardy and therefore he would fire the beanbag round in order to knock Deorle down and arrest him. Supp. E.R. 322; Depo. of Rutherford at pp. 43, 49-51, 107; Supp. E.R. 64.

Deorle threw down the crossbow and suddenly advanced toward Deputy Rutherford with a can of lighter fluid in his hand threatening the deputy that he was going to kick his ass. E.R. 110; Supp. E.R. 322; Supp. E.R. 390. Deputy Rutherford considered the can of lighter fluid to be a threat to him, as Deorle could have sprayed lighter fluid in the deputy's eyes and taken his weapon or Deorle could have sprayed him with fluid and lite him on fire. E.R. 151; Supp. E.R. 64; Supp. E.R. 322; Depo. of Rutherford at pp.

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[2] Deorle stated, in a taped interview taken two days after the incident, that the crossbow was loaded. Supp. E.R. 310. Deorle's wife stated in her interview just after the incident, that the crossbow "does look serious." Supp. E.R. 132 (Judge Silverman), Dissenting) App. p. 21, n.1.

106-07. Deputy Rutherford was also concerned about the safety of neighbors at home nearby and bystanders who had gathered in this residential area who could be harmed if Deorle were to get by him. E.R. 146; Supp. E.R. 64; Supp. E.R. 322; Depo. of Rutherford at pp. 49-51, 107. Lieutenant Nichols also believed that Deorle was going to assault Deputy Rutherford. Supp. E.R. 390.

When Deorle reached approximately thirty feet from him, Deputy Rutherford shot the beanbag round intending to strike Deorle in the lower right torso. Supp. E.R. 322; Supp. E.R. 64; Depo. of Rutherford at pp. 66, 94. The beanbag round malfunctioned, flew up and to the right, unexpectedly striking Deorle in his left eye and causing injury. E.R. 67; Supp. E.R. 322; Supp. E.R. 64.

Deputy Rutherford estimated that he was on the scene for approximately thirty to forty minutes before deploying the beanbag round. E.R. 37. The Paradise Police Department dispatch log indicates that one hour and twenty-eight minutes passed from the time they received the call for backup to the deployment of the non-lethal force. Supp. E.R. 70.

B. The District Court Proceedings

On March 20, 1997, Deorle brought suit in the United States District Court for the Eastern District of California. He asserted claims against Deputy Rutherford, Butte County Sheriff Mick Grey and The County of Butte ("County Defendants") pursuant to 42 U.S.C. § 1983 alleging that his rights under the Fourth and Fourteenth Amendments had been violated. The jurisdiction of the District Court was founded upon 28 U.S.C. § 1343(a)(3). He also brought suit against Defense Technologies, Inc, the manufacturer of the beanbag round, on theories of negligence and products liability. Both the County Defendants and Defense Technologies filed motions for summary judgment.

On April 13, 1999, the District Court granted the County Defendants/Petitioners' Motion for Summary Judgment on the

grounds that Deputy Rutherford was entitled to qualified immunity in that a reasonable jury could not find that no reasonable officer would have made the same decision under the circumstances. The Court found that Deputy Rutherford did not violate Deorle's right to be free from excessive force as a matter of law. The District Court reasoned that a deranged and threatening Deorle advanced on Deputy Rutherford and put him on the defensive, forcing him to make a split-second decision to protect himself. Furthermore, the Court reasoned that the surrounding officers could not have prevented Deorle's attempted attack without deploying less-lethal or lethal force themselves, and Deputy Rutherford's only alternative was to engage in hand to hand combat, a choice the law does not compel. App. pp. 73-74. Because the District Court found that Deputy Rutherford did not violate Deorle's right to be free from excessive force, it dismissed, without deciding, Deorle's remaining claims against the Sheriff and the County of Butte.

Plaintiff filed a Motion for Reconsideration with the District Court, which was denied on May 3, 1999. After the District Court also granted Defense Technologies' Motion for Summary Judgment, final judgment was entered as to all issues on June 14, 1999.

C. The Court Of Appeals Proceedings

On July 9, 1999, Deorle filed an Amended Notice of Appeal from the District Court's Order granting County Defendants/Petitioners' Motion for Summary Judgment.

On March 16, 2001, the Court of Appeals rendered a split decision. The majority opinion authored by Judge Reinhardt in favor of Deorle, reversed the District Court's entry of summary judgment. App. p.47. A strong dissent was authored by Judge Silverman.

Petitioners filed a Petition for Rehearing and Suggestion for Rehearing En Banc. The Court of Appeals denied the Petition for

Rehearing and Suggestion for Rehearing En Banc, but issued an amended opinion on August 31, 2001. App. p.25

Petitioners filed an Amended Petition For Rehearing and Suggestion for Rehearing En Banc based upon this Court's Opinion in Saucier v. Katz. An active judge requested a vote on whether to rehear the matter en banc, but the matter failed to receive a majority of the votes from the active judges in favor of en banc consideration, and the Petition for Rehearing En Banc was therefore denied. However, the Court of Appeals issued a second amended opinion in an attempt to bring its opinion into compliance with this Court's recent opinion in Saucier v. Katz. App. p.1. The majority opinion again denied qualified immunity to Deputy Rutherford, without citing to any factual analogous case law, with a dissenting opinion by Judge Silverman.

REASONS WHY CERTIORARI SHOULD BE GRANTED

I.

Review Is Warranted Because Of The National Importance In Determining Whether The Use Of Non-Deadly Force Through The Deployment Of The "Beanbag" Round Is A Reasonable Use Of Force Against An Advancing Threatening And Dangerous Individual And The Analysis By The Majority Panel Of The Ninth Circuit Significantly Departs From The Decisions Of This Court.

On November 19, 2001, in a 2-1 split decision, the Ninth Circuit issued an opinion which found the shooting of the beanbag round at Deorle violated Deorle's right to be free from an unreasonable seizure. App. p. 18. In reaching its decision, the majority opinion disregarded the guidance of this Court in Graham v. Connor, 490 U.S. 386, 109 S. Ct. 1865 (1989). Specifically, the majority opinion relied upon an hindsight analysis, increased the burden of a peace officer in establishing a governmental interest and has created a new legal standards by requiring a warning, when feasible, in situations involving less than lethal force, and requiring officers to differentiate between a mentally unstable person and other criminal suspects in dangerous situations.

Review of that opinion is therefore necessary and appropriate since the majority opinion conflicts with the decisions of this Court and other Circuit Courts and to provide for a rule of national application and uniformity to be relied upon by peace officers when using non-deadly force in the form of shooting a beanbag round.

In Saucier v. Katz, 533 U.S. 194, 121 S. Ct. 2151 (2001), this Court clarified the appropriate analysis for determining whether a peace officer is entitled to qualified immunity in cases involving the alleged use of excessive force. This Court instructed that lower courts need to concentrate on the definition of the constitutional right and determine whether a constitutional violation could be found on the facts in that case. Id. at 285. If no constitutional right could have been violated under those facts, then it is not necessary for any further inquiry regarding qualified immunity. Id. Although the facts must be taken in the light most favorable to the party asserting the claim, a peace officer's conduct is reviewed based upon the facts and circumstances known to the peace officer, including reasonably trustworthy information provided to them. Id. at 285 citing Hunter v. Bryant, 503 U.S. 224, 228, 112 S. Ct. 534 (1991) quoting Beck v. Ohio, 379 U.S. 89, 91, 85 S. Ct. 223 (1964). "Excessive force claims, like most other Fourth Amendment issues, are evaluated for objective reasonableness based upon the information the officers had when the conduct occurred." Id. at 285. Moreover, in those circumstances, "officers can have reasonable, but mistaken beliefs as to the facts establishing the existence of probable cause or exigent circumstances, for example, and in those situations, courts will not hold that they have violated the constitution." Id. at 284.

The totality of the undisputed facts and circumstances in this case compel the conclusion that Deputy Rutherford's conduct was objectively reasonable within the meaning of Graham. Deorle was intoxicated, out of control and on a rampage. He had threatened officers with a board with protruding nails, hatchets and a crossbow and had threatened to kill any officer who came on

his property. He also threatened that it would be necessary for the officers to shoot him. The crime of threatening officers with weapons that would cause them great bodily injury or death was not only serious, but there were potentially grave consequences to both the officers present, to whom Deorle posed a serious threat of harm, and to Deorle himself who taunted the officers to kill him. Deorle was ultimately charged with four felony counts of violation of California Penal Code section 69 which prohibits the use of threat or violence to prevent an officer from performing his duties.

The undisputed facts also establish that Deorle posed an immediate threat to the safety of Deputy Rutherford. Deorle was advancing toward Deputy Rutherford armed with a quart container of lighter fluid and threatening words to the effect that he was going to kick his ass. The lighter fluid could obviously be sprayed at Deputy Rutherford's eyes from a distance to attempt to incapacitate him or could be used to light him on fire and therefore must be considered as a weapon. Once Deorle reached a point within twenty feet or less of Deputy Rutherford, the beanbag round could not be used. The alternative of hand to hand combat or the use of other impact weapons could likewise result in serious injury to either the officers or Deorle. Deputy Rutherford was also concerned about the safety of neighbors and bystanders. Here, the very essence of the Graham factors came into play. Deputy Rutherford was attempting to access the Deorle property to better familiarize himself and the SIRT team with the scene. When Deorle returned to his property and discovered Deputy Rutherford, Deorle was holding the crossbow and the lighter fluid, their exchange of words was tense and given the facts known to Deputy Rutherford about Deorle's intoxicated and threatening conduct there was no telling what Deorle may do. From the perspective of a reasonable officer on the scene in the position of Deputy Rutherford, Deorle suddenly made a decision to advance at him which required Deputy Rutherford to make a split-second decision to use the beanbag round to temporarily incapacitate Deorle. It is undisputed that through his threats and actions, Deorle was

advancing toward Deputy Rutherford intending to cause him serious harm. Petitioners respectfully submit that based on the circumstances confronting Deputy Rutherford, his conduct was objectively reasonable under the Fourth Amendment.

The majority panel of the Ninth Circuit erred in analyzing whether the force used was objectively reasonable in this case by adopting new or different legal standards inconsistent with this Court's analysis in Graham. Initially, the Court of Appeals found the use of beanbag rounds to constitute non-deadly force.[3] The Court of Appeals then analyzed the nature and quality of the intrusion on Deorle's Fourth Amendment interests in the context of the type and amount of force used. App. p. 9. The Court of Appeals classified the use of the beanbag as force capable of causing serious injury. App. p. 11. In so doing, the court found this type of force could be lethal under some limited circumstances. App. pp.10-11. However, the majority panel disregarded the evidence as to the nature and purpose of the beanbag round. First, the beanbag round is designed to knock a person down and temporarily incapacitate them. Second, when fired at a distance between twenty and forty feet, the beanbag round is not reasonably calculated to cause serious injury. Rather, the beanbag round is meant to prevent serious injury. Moreover, Deputy Rutherford was trained in the proper use of the beanbag round and that its appropriate use would involve confrontations with suicidal persons and those threatening injury or death to themselves, officers or others. When that evidence is viewed in the context of this case, the type of force in the form of shooting a beanbag round is appropriate and reasonable.

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[3] The issue of whether the use of a beanbag round constituted deadly or non-deadly force had not previously been decided by any reported decision. See Omdahl v. Lindholm, 170 F.3d 730 (7th Cir. 1999)(remanded case to district court for determination of whether beanbag rounds constitute deadly or non-deadly force).

In assessing the amount of the force used, the majority panel relied upon on the nature of the injury sustained by Mr. Deorle. This type of "after the fact analysis violates the fundamental precept of Graham" by relying upon hindsight in terms of what injury was ultimately sustained by the suspect. See Forrester v. City of San Diego, 25 F.3d 804, 808 n.4 (9th Cir. 1994), *cert. denied*, 513 U.S. 1152 (1995) (rejecting reliance on the serious nature of the injuries suffered by plaintiff to negate the reasonableness of the force). In actuality, the amount of the force used must be analyzed in relation to the officer on the scene. In this case, the shooting of the beanbag round was meant to knock down and temporarily incapacitate Deorle. Thus, the nature and quality of the intrusion upon Deorle's personal security in relation to the amount of force used was intended to be minimal.

In reaching its decision, the majority panel also created new legal standards for analyzing whether use of non-lethal force is objectively reasonable under the Fourth Amendment. Determining that the shooting of the beanbag round violated Deorle's right to be free from unreasonable seizures, the majority opinion determined that "less than deadly force that may lead to serious injury may be used only when a strong governmental interest warrants its use, . . ." App. p. 18. In so doing, the Ninth Circuit has now increased the burden on government officials in cases involving the use of force when the particular force may lead to serious injury. Broadly construed, the Ninth Circuit could now characterize almost any type of force under the right circumstances as leading to serious injury. See Vera Cruz v. City of Escondido, 139 F.3d 659, 661-63 (9th Cir. 1997), *cert. denied*, 525 U.S. 869 (1998)(use of dogs are non-lethal force although the use of almost any type of force can be potentially lethal). This heightened standard of a strong governmental interest has not previously been imposed in any cases involving the use of non-lethal force and is contrary to the standard set forth in Graham. In Graham, this court made it clear that the test for determining whether the force used is reasonable under the Fourth Amendment necessitates a

balancing of the individual's interests against the governmental interest at stake. Graham v. Connor, supra, at 1871 citing Tennessee v. Garner, 471 U.S. 1, 8, 105 S. Ct. 1694 (1985). At no time has this Court imposed a heavier burden on the officer in the form of a "strong" governmental interest.

In addition, the majority panel of the Ninth Circuit has now established that in cases involving the use of force which may result in serious injury, warnings should be given, when feasible. App. pp. 16-18. Once again, there is no case law which supports the proposition that a peace officer is either required to or should issue a warning, if feasible, in connection with the use of non-deadly force. Thus far, the only cases which require or suggest that a warning be given to the suspect are those involving the use of deadly force. Nevertheless, the majority panel found that "the desirability and feasibility of a warning are obvious." App. p. 17. On that basis, the majority panel concluded that the failure to give a warning is a factor to be considered in a case involving the use of non-lethal force that is being analyzed under the Graham test. To now impose that factor in this case is clearly the type of hindsight analysis prohibited by this Court in Graham. Therefore, Petitioner respectfully submits that the majority panel of the Ninth Circuit erred in imposing a warning factor in analyzing the use of non-lethal force in this case.

In what also appears to be a novel finding, the majority panel concluded that the governmental interest in using force is diminished by the fact that the officers are confronted with a mentally ill individual. App. p. 15. Similar to requiring a strong or substantial governmental interest and a warning, the Ninth Circuit now seeks to impose a requirement that officers in the field make a determination whether a suspect is mentally ill and, if so, they must limit their use of force under the circumstances. Without any factual or statistical foundation, the majority also concluded problems and tactics employed against an unarmed emotionally distraught individual who is creating a disturbance or resisting arrest is different from those involving an officer's use of

force to subdue an armed or dangerous criminal. App. p. 15. To the contrary, a disturbed individual who is threatening peace officers, whether armed or not, can pose a serious threat of injury or death to a peace officer. Petitioners respectfully submit that it is not necessarily appropriate for an officer to distinguish between an individual who is mentally ill and a criminal. Rather, the important consideration is the individual's conduct and whether he poses a threat of injury or death to the officer, themselves or others.

In this case, although Deorle may have been emotionally distraught, he was also intoxicated and threatening to kill officers while holding various lethal devices. If allowed to stand, it is this type of approach suggested by the Ninth Circuit which may lull an officer into bringing his guard down and which could result in a greater likelihood of injury or death to an officer. For those reasons, Petitioners respectfully submit that such a factor should not be recognized and considered within the Graham framework, and in particular should not have been considered within the context of this case.

In weighing the conflicting interests, the majority panel also emphasizes that Deputy Rutherford had alternatives available to him other than firing the beanbag round. App. pp. 13-14, 16. Specifically, the majority panel suggests that Deputy Rutherford should have retreated and escaped from his position to the roadblock or some buffer zone behind him. Alternatively, Rutherford could have merely awaited the arrival of skilled negotiators. Traditionally, however, officers have not been required to use the less intrusive degree of force possible. See Forrester v. City of San Diego, 25 F.3d 804, 807 (9th Cir. 1994). Nor have they been required to assess whether they can retreat or run backwards. See, *e.g.*, Plakas v. Drinski, 19 F.3d 1143, 1149-50 (7th Cir. 1994). In this case, Deputy Rutherford was in the process of surveying the area in and around Deorle's residence in order to familiarize himself and other officers regarding the property. It was Deorle who confronted Deputy Rutherford and it was Deorle

who suddenly advanced toward Deputy Rutherford threatening to do him physical harm. Thus, the undisputed facts do not present the type of situation where there is no immediate threat to the safety of the officer which may allow for reflection and consideration of alternative methods of taking Deorle into custody. Rather, Deputy Rutherford attempted to speak to Deorle, felt he should maintain the position where he felt secure and it was only after Deorle began advancing toward him holding the container of lighter fluid and threatening to kick his ass that the deputy fired the beanbag round in accordance with his training at a distance of approximately thirty feet. Therefore, Petitioners respectfully submit that the majority panel of the Ninth Circuit erred in relying upon any potential alternative methods for the use of force in weighing the conflicting interests in this case.

The opinion of the Ninth Circuit also conflicts with other Courts of Appeal who have found analogous uses of non-deadly force reasonable. In Russo v. City of Cincinnati, 953 F.2d 1036 (6th Cir. 1992), the Court of Appeals for the Sixth Circuit granted qualified immunity to an officer who used a taser or stun gun weapon to incapacitate a mentally disturbed and suicidal individual who was refusing to return to a mental institution. The taser shoots a dart that sends a high voltage electric current through an attached wire and is designed to incapacitate a person. Id. at 1040, n.1. In Russo, the police were confronted with a suicidal and mentally unstable Thomas Bubenhofer, who was threatening the officers and appeared in a doorway a few feet from the officers holding a knife in each hand. Id. Upon seeing this, an officer shot a taser dart at Bubenhofer. However, Bubenhofer momentarily shook off the effects of the taser and began to rush at the officers. The officers then fired their revolvers at him, striking him and causing him to fall down six or seven stairs. However, Bubenhofer would not drop the knife and the officer shot two more taser darts at Bubenhofer, one striking him in the face. Although the tasers momentarily slowed him, Bubenhofer again lunged at the officers while holding the knife and the officers fired

their revolvers at him, killing him. The Sixth Circuit determined that the officer's initial and second uses of the taser to subdue the deranged, threatening and armed individual did not constitute excessive force and thus granted qualified immunity to the officer who fired the taser. Id. at 1044-45. The court noted that, although in hindsight the use of the taser proved tragic, the officer fired the taser in an effort to obviate the need for lethal force. Id.; see also Hinton v. City of Elwood, 997 F.2d 774 (10th Cir. 1993)(finding officer's use of stun gun against resisting suspect to be objectively reasonable).

Moreover, other Circuit Courts of Appeals have ruled that the use of deadly force was reasonable in circumstances which were similar to those of this case. In Plakas, *supra*, 9 F.3d 1143, a deputy's shooting of an intoxicated and deranged man who charged him with a fireplace poker was held to be reasonable by the Seventh Circuit Court of Appeals. The Court of Appeals stated:

> [Deputy] Drinski was faced with a man who had, minutes before, attacked a police officer with a dangerous weapon, had refused several entreaties to disarm, had told the officer that one of the two would die that night, and then had moved toward the officer while raising [a fireplace poker] to strike. Shooting a man who has told you, in effect, that he is going to use deadly force against you and then moves toward you as if to do so is unquestionably an act of self defense even if, as Plakas's expert maintains, the man is attempting "suicide by police."

Id. at 1146; see also Roy v. Inhabitants of the City of Lewiston, 42 F.3d 691 (1st Cir. 1994)(holding that officers' shooting intoxicated man who made kicking-lunging motion toward them with two small knives was reasonable). If the use of deadly force in these cases were deemed reasonable, the use of non-deadly force by the

beanbag round in this case should also be considered reasonable. Similarly to what occurred in Plakas, a deranged Deorle advanced on Deputy Rutherford while holding a container of lighter fluid and threatening the Deputy. Also as in Plakas, Deorle had repeatedly threatened to take his own life and to kill or assault any officer who got in his way. The only difference between the cases is that, in this case, Deputy Rutherford used non-deadly, rather than deadly force.

Law enforcement confrontations with out of control and enraged individuals often necessarily involve the use of deadly force with unsettling results. Recently, law enforcement agencies have begun to seek alternatives to the use of deadly force in certain situations where it can be avoided. One such way law enforcement has attempted to avoid the use of deadly force has been to develop devices that deploy non-lethal or less than lethal force. See Neal Miller, *Less-Than-Lethal Force Weaponry: Law Enforcement and Correctional Agency Civil Law Liability For The Use Of Excessive Force*, 28 CREIGHTON L. REV. 733, 735 (1995). Non-lethal or less than lethal force, such as the beanbag round used in this case, are so termed because they are much less likely to result in death or serious injury when used properly. Id. In addition to the beanbag rounds used in this case, some examples of these alternatives to deadly force are tasers or stun guns, rubber bullets, pain compliance techniques and pepper spray. See id. at n.4; Plakas v. Drinski, 19 F.3d 1143, 1150, n.6 (7th Cir.), *cert. denied*, 513 U.S. 820 (1994). However, there is always some likelihood that death or serious injury will result whenever any force is used, even if it comes in the form of an alternative to deadly force. See Miller, 28 CREIGHTON L. REV. at 735-36, n.2 (citing Joseph Berger, Westchester Man Sprayed by Police Dies, N.Y. Times, Oct. 15, 1993, at B1, Pepper Spray Comes Under Scrutiny After N.C. Man Dies in Police Custody, 27 Crime Control Digest 3, Aug. 2, 1993). The majority opinion is the type of decision that will have the unfortunate result of chilling a trend toward evolution use of safer methods of force in law enforcement. See Miller, 28 CREIGHTON L.

REV. at 735-37, n. 5; see also, Plakas, 19 F.3d at 1150 n.6 (noting that plaintiffs have argued in deadly force cases that the failure to use an alternative to deadly force, such as beanbag rounds, is itself a factor supporting the finding of excessive force).

In light of the foregoing analysis, Petitioners respectfully submit that Deputy Rutherford's use of the beanbag round as an alternative to deadly force was a reasonable use of force under the Graham standard. Deputy Rutherford was faced with an imminent attack from the raging Deorle who was holding a quart container of lighter fluid in his hand. Deputy Rutherford was not obliged to engage Deorle in hand-to-hand combat, nor did he have to retreat and allow Deorle to attack others in the nearby area. The use of the beanbag round is intended only to incapacitate an individual and allow for their arrest without inflicting serious injuries. Deputy Rutherford had been trained and used the device properly, aiming for Deorle's lower abdominal area from the proper distance. See Miller, *supra*, 28 CREIGHTON L. REV. at 768 (stating that less than lethal force is often appropriate to use against barricaded individuals armed with a weapon other than a firearm in order to prevent the need to use deadly force). If allowed to stand, the Court of Appeals' opinion will discourage the use of the beanbag rounds and other non lethal devices as alternatives to the use of deadly force through traditional guns and bullets.

In Malley v. Briggs, 475 U.S. 335, 341, 106 S.Ct. 1092 (1986), this Court announced that qualified immunity protects all but the plainly incompetent or those who knowingly violate the law. Moreover, an officer's use of force does not violate the Fourth Amendment when an "officer reasonably, but mistakenly, believed that a suspect was likely to fight back, for instance, the officer would be justified in using more force than in fact was needed." Saucier v. Katz, supra, 121 S.Ct. At 2158. It cannot reasonably be disputed that Deputy Rutherford did not act plainly incompetent, nor did he knowingly violate the law in this case. Even assuming arguendo Deputy Rutherford mistakenly believed that Deorle was advancing toward him to cause him harm or that Deorle could use

the lighter fluid to cause him harm, those beliefs would be reasonable in light of all the information known to Deputy Rutherford concerning Deorle's conduct that day. Therefore, even if Deputy Rutherford reasonably., but mistakenly believed, that Deorle was advancing to cause him serious injury, Deputy Rutherford would have been justified in firing the beanbag round to knock Deorle down and temporarily incapacitate him, even if that was more force then needed. Thus, Petitioner respectfully submits that given Deputy Rutherford's reasonable beliefs of Deorle based on all of the information available to him, the use of the beanbag round was objectively reasonable and therefore Deputy Rutherford is entitled to qualified immunity.

The majority opinion of the Ninth Circuit is contrary to the legal standard enunciated by this Court in Graham and does not allow for the application of qualified immunity when the undisputed facts of the officer's conduct do not constitute a violation of the Fourth Amendment. Therefore, the majority opinion of the Ninth Circuit is in error and review is warranted in this case.

II.

Review Is Warranted Because The Opinion By The Ninth Circuit Conflicts With The Opinions Of This Court And Those Of Other Circuit Courts Of Appeal Concerning The Legal Standard For Determining Whether The Law Is Clearly Established For Purposes Of Qualified Immunity And It Is Of National Importance To Afford Qualified Immunity To Peace Officers When The Law Is Not Clearly Established Due To Conflicting Legal Standards, The Lack Of Any Factual Analogous Case Law And The Imposition Of New Standards

A. The Law Regarding The Firing Of A Beanbag Round Was Not Clrearly Established In September, 1996.

The District Court found that Deputy Rutherford was entitled to qualified immunity with respect to Deorle's claim for use of excessive force on the grounds that "a reasonable jury could not find that no reasonable officer would have made the same decision under the circumstances that confronted Deputy Rutherford." App. p. 74. In its decision rendered post Saucier v. Katz, the majority panel for the Ninth Circuit found that Deputy Rutherford was not entitled to qualified immunity, although there is no prior case law prohibiting the use of the beanbag round similar to the facts and circumstances in this case, because "no reasonable officer could have believed that Rutherford's action in shooting Deorle with the . . . beanbag round was appropriate or lawful." App. p. 19. At the time of the firing of the beanbag round in this case in September, 1996, however, there was no reported decision regarding the firing of a beanbag round and there was no factually analogous case law precedent. Moreover, despite denying qualified immunity, the Ninth Circuit imposed new standards governing the use of force upon which a peace officer's conduct may be adjudged objectively reasonable. Review by this Court is therefore necessary and appropriate to ensure the uniform application of qualified immunity in cases where the law is not clearly established in that the legal standard adoptee by the Ninth circuit conflicts with the law of this Court and other Courts of Appeal, the Ninth Circuit requires new standards and the law was not well settled regarding the use of a beanbag round.

This Court recently set forth the guidelines for the application of qualified immunity when excessive force is alleged. Saucier v. Katz, 533 U.S. 194; 121 S. Ct. 2151 (2001). Assuming an officer's conduct violated a constitutional right, then the next inquiry is whether that right was clearly established at the time of the incident. Id. at 281; 2156; Anderson v. Creighton, 483 U.S. 635, 639 (1987); Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

The test is whether a reasonable officer would have believed the shooting of the beanbag round to be lawful, in light of clearly established law and the information possessed by the officer. Hunter v. Bryant, supra, 503 U.S. at 227. The right alleged to have been violated must have been clearly established in a particularized, relevant sense. Saucier v. Katz, supra, 533 U.S. at 282, citing Anderson v. Creighton, supra, 483 U.S. at 640. For example, that level of specificity is achieved when "various courts have agreed that certain conduct is a constitutional violation under facts not distinguishable in a fair way from the facts presented in the case at hand . . ." Id. This Court further explained:

> an officer might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances. If the officer's mistake as to what the law requires is reasonable, however, the officer is entitled to the immunity defense.

Id. at 284. In those circumstances, qualified immunity protects officers from the "hazy border between excessive and acceptable force." Id. at 284 citing Priester v. Riviera Beach, 208 F.3d 919, 926-927 (11th Cir. 2000).

Petitioners respectfully submit that "clearly established" means a clear bright line standard not compromised of generalities or possibilities. The bright line of clearly established law is "staked out by a process of inclusion and exclusion in individual concrete cases." Donovan v. City of Milwaukee, 17 F.3d 944, 953 (7th Cir. 1994). Moreover, "[i]f the law at the time is not clearly established, an officer could not reasonably be expected to anticipate subsequent legal developments nor could he or she fairly be said to 'know' that the law forbade conduct not previously identified as unlawful." Harlow v. Fitzgerald, supra, 457 U.S. at 818. As Saucier reaffirms and the First Circuit Court of Appeals aptly pointed out, "the Supreme Court intends to surround the

police who make these on-the-spot choices in dangerous situations with a fairly wide zone of protection in close cases." Roy v. Inhabitants of the City of Lewiston, 42 F.3d 691, 695 (1st Cir. 1994).

In determining whether the law was clearly established in this case, the majority panel of the Ninth Circuit relied upon Mendoza v. Block, 27 F.3d 1357, 1361 (9th Cir. 1994) which quoted Castell v. Pieschek, 3 F.3d 1050, 1053 (7th Cir. 1993). The Castell case stood for the proposition that a defendant's conduct could be so patently violative of a person's constitutional rights that guidance from the courts through closely analogous preexisting case law would not be required to show that the law is clearly established. The adoption of that legal standard in this case, however, is directly contrary to the legal standard adopted by this case in Saucier, which requires that various courts have found that certain conduct constitutes a constitutional violation under facts similar to the facts presented in this case. Moreover, under the circumstances of this case, the legal standard regarding whether the law is clearly established as adopted by the Ninth Circuit directly conflicts with the legal standard adopted in the Seventh and Eleventh Circuits. Compare Deorle App. pp. 19-20 (holding that although there is no prior case prohibiting the shooting of a beanbag round in precisely the circumstances involved and the absence of direct precedent, the law was clearly established) with Morrell v. Mock, 270 F.3d 1090, 1100-1101 (7th Cir. 2001) (requiring closely analogous case and rejecting potently obvious violation), Vaughn v. Cox, 264 F.3d 1027, 1036 (11th Cir. 2001) (holding that the preexisting case law must compel the conclusion that what the officer was in that case violates federal law) and Willingham v. Loughman, 261 F.3d 1178, 1188 (11th Cir. 2001) (requiring that there must be a materially similar case already decided that what the police officer was doing was unlawful in order for the law to be clearly established in the context of the Fourth Amendment). See also Branton v. The City of Dallas, 272 F.3d 730, 7440745 (5th Cir. 2001); Campbell v.

Peters, 256 F.3d 695, 700-701 (7th Cir. 2001). Thus, Petitioners respectfully submit that review is warranted by this Court to further clarify and define the legal standard regarding factually analogous case law under the second prong of the Saucier test.

In the case at bar, the majority panel in the Ninth Circuit has incorrectly attempted to expand the realm of a very narrow exception to the requirement that there be factually analogous case law to place an officer on notice that his conduct may violate a constitutional right. Generally, this narrow exception would only apply if an officer's conduct is obviously a violation of a constitutional right, and only then would guidance from the courts not be necessary to show that the law is clearly established. In those circumstances, a reasonable official would be presumed to know that the action was unconstitutional. In connection with this narrow exception, this Court has recognized "the easiest cases don't even arise. There has never been . . . a section 1983 case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the officials would be immune from damages [or criminal] liability." United States v. Lanier, 520 U.S. 259, 271; S. Ct. 1219, 1227-1228 (1997) (citation omitted). Indeed, even the Ninth Circuit has previously recognized this narrow exception. See Mendoza v. Block, 27 F.3d 1357, 1362 (9th Cir. 1994) (particularized case law would not be necessary for a deputy to know that it would constitute excessive force to sic a canine on a handcuffed arrestee who has fully surrendered and is completely under control). See also Priester v. City of Riviera Beach, 208 F.3d 919, 926-27 (11th Cir. 2000) (applying exception to situation where police ordered dog to attack suspect who complied with officers, was on the ground and presented absolutely no threat). In Priester, the Eleventh Circuit correctly concluded that this exception should be reserved for only the most obvious cases, where a plaintiff can show that defendant's conduct was "so far beyond the hazy border between excessive and acceptable force that . . . every reasonable officer in their position would [inevitably] conclude the force was unlawful." Id.

If allowed to stand, this expanded exception as interpreted by the majority panel of the Ninth Circuit will in effect circumvent the test for whether the law is clearly established in Saucier. Under almost any given factual scenario, courts in the Ninth Circuit could easily conclude that it would have been obvious to that officer that his conduct violated a constitutional right. This is precisely the type of broad form general rule that the specific holding by this Court in Saucier was meant to prevent. This is similar to how the Ninth Circuit avoided the application of qualified immunity after the Graham decision by concluding that the law was then clearly established for all excessive force cases. Saucier, supra, 121 S. Ct. at 2155. Specifically, the Ninth Circuit will permit its broad interpretation of what was once thought of as a narrow exception to swallow the rule that the law be concrete and factually defined in order to be clearly established. In fact, the Ninth Circuit has already begun to use this narrow exception as a loop hole to escape the rule that the law be clearly established as set forth in Saucier. A recent case from the Ninth Circuit has now relied upon the majority opinion in this case for the proposition that the court need not find a factually analogous case in order to find that the law regarding excessive force was clearly established and deny qualified immunity. See Headwaters v. County of Humbolt, ("Headwaters II"), 2002 U.S. App. Lexis 455, *14, *on remanded from*, 122 S.Ct. 24 (2001), *amending and supplementing*, Headwaters v. County of Humboldt ("Headwaters I"), 240 F.3d 1185 (9th Cir. 2000). See also Vaughan v. Cox, supra, 264 F.3d at 1038-1039 (dissent by Judge Noonan sitting by designation from the Ninth circuit relying upon general rule rather than factually similar law).

Prior to this case, there is no reported decision holding that the deployment of beanbag rounds could constitute excessive force under any circumstances. Given the undisputed facts that Deputy Rutherford knew that Deorle had threatened officers with roofing hatchets, a cross-bow, a board with nails, was under the influence of alcohol and possibly controlled substances, had threatened to

kill officers or they should kill him, that he was out of control, that a neighbor was in the area and the perimeter was not secure and, following a brief exchange with Deorle at a distance of approximately forty feet, Deorle suddenly advanced toward Deputy Rutherford threatening to physically assault him while holding a quart container of lighter fluid. When Deorle reached a point of approximately thirty feet away from Deputy Rutherford, he fired a beanbag round at Deorle in order to knock him down and temporarily incapacitate him. Moreover, this is precisely the type of circumstances in which Deputy Rutherford was trained to utilize a beanbag round and based on that training, Deputy Rutherford would not be able to use a beanbag round if Deorle reached a distance of twenty feet away from him. Clearly, this is not an easy case where the conduct of the officer so obviously violates the constitutional rights of a suspect. Rather, this was a dynamic event which involved a subject who was intoxicated and out of control and given his prior threats and conduct was potentially capable of inflicting serious injury or death on the officer. For those reasons, Petitioners respectfully submit that the undisputed facts of this case should not be used to expand an otherwise narrow exception to the test for clearly established law set forth by this Court in Saucier.

In addition, the findings of the majority panel with respect to whether the conduct of Deputy Rutherford could constitute a violation of the Fourth Amendment is internally inconsistent with whether the law could be clearly established under the facts and circumstances of this case. In that regard the Ninth Circuit has added three new factors to be considered under the Graham analysis without reference to any legal precedent. First, the majority panel required Petitioner to make a showing of a strong governmental interest. App. p. 11. Second, the holding requires that Petitioner should have given a warning if feasible with the use of non-lethal force. App. p. 18. Third, the Court of Appeals holds that Petitioner should take into consideration the status of whether Deorle was mentally ill or unstable. App. p. 15. In spite of

requiring that Petitioner be governed by a heightened burden of governmental interest and new factors to access the reasonableness of his conduct for which there is no prior case law authority, the Court of Appeals concluded that the law was clearly established under the facts and circumstances of this case. Absent any authority for imposing those standards on Petitioner on or before September, 1996, it is inconceivable how the contours of the rights were sufficiently clear that a reasonable officer would understand that what he is doing violates that right. See Anderson v. Creighton, supra, 483 U.S. at 640.

Petitioner also respectfully submits that the law regarding the shooting of a beanbag round at a suspect was not clearly established at the time of this incident in September, 1996, because the legal standard as to whether this constituted deadly or non-deadly force was not settled. Not only was there no case law which defined the circumstances under which a beanbag round may be used to subdue a suspect, but the only published decision regarding the use of the beanbag round found that as of March, 1999, there was a factual dispute as to whether the use of the beanbag round constituted deadly or non-deadly force. See Omdahl v. Lindholm, 170 F.3d 730, 733-734 (7th Cir. 1999). Thus, a reasonable officer is the position of Deputy Rutherford could not have known that he violated a clearly established constitutional right of Deorle in that at least prior to this case, the law was not clearly established with respect to how this particular type of force would be characterized in terms of deadly or non-deadly force.

Based on the foregoing, Petitioner respectfully submits that review is warranted in this case to define what constitutes clearly established law in the context of when new and different requirements are adopted by the Courts of Appeal and to reconcile the requirement of factual analogous case law to provide for national uniformity of that standard. Petitioner respectfully requests that this Court grant this Writ of Certiorari in order to review the Ninth Circuit's opinion to clarify when the law is clearly

established in relation to the policy favoring qualified immunity or public officials.

B. A Reasonable Officer Firing A Beanbag Round At An Advancing Threatening Intoxicated Suspect Would Not Have Known That He Was Violating Clearly Established Law.

Contrary to this Court's guiding principles in Saucier, the majority opinion of the Ninth Circuit fails to adhere to the rules established for the second prong of the qualified immunity analysis. The teachings of this Court requiring factual specificity in the context of whether the law is clearly established flow from a long line of cases from Anderson, Hunter, Lanier, Wilson to Saucier. That requirement has theoretically been clear and unambiguous. See Vaughn v. Cox, supra, 264 F.3d at 1036 (post Saucier case) and Lassiter v. Ala. A&M Univ., 28 F.3d 1146, 1149-50 (11th Cir. 1994). This case, however, once again gives rise to the need for this Court to establish a uniform application of the legal standard to be applied with respect to whether the law is clearly established in the application of qualified immunity.

The majority opinion expressly concedes that "there is no prior case prohibiting the use of this specific type of force in precisely the circumstances here involved. . . ." App. p. 19. As the Eleventh Circuit correctly noted, the most common error involving whether the law was clearly established under the circumstances confronting the defendant is to rely upon general rules and abstract rights. Lassiter, supra, 28 F.3d at 1150. In this case, the majority panel has taken its position to the extreme. To conclude that a constitutional violation is obvious in this case is the penultimate of abstract generality. The undisputed facts in this case call into play the need for practical application to real life situations involving concrete circumstances. However, here as in Saucier, "neither respondent nor the Court of Appeals has identified any case demonstrating a clearly established rule prohibiting the officer from acting as he did." Saucier v. Katz,

supra, 121 S.Ct. At 2160. Absent any cases in which "various courts have agreed" that the conduct of firing a beanbag round in circumstances similar to this case is a constitutional violation, a reasonable officer in the position of Deputy Rutherford in September, 1996, could not have known that he was violating a clearly established right.

Prior to September, 1996, there were only two reported decisions which may even potentially involve factually analogous cases. Both of those cases, however, would support the application of qualified immunity in favor of Deputy Rutherford. In Russo v. City of Cincinnati, 953 F.3d 1036, 1044-45 (6th Cir. 1992), the Sixth Circuit found that there was no excessive force by a police officer who used a taser stun gun against an advancing, emotionally unstable, suicidal threatening individual armed with knives. In Hinton v. City of Elwood, 997 F.2d 774, 781-82 (10th Cir. 1993), the Tenth Circuit found that a peace officer's use of a stun gun was reasonable in light of the plaintiff actively resisting the attempts to handcuff him. Thus, the guidance, if any, which Deputy Rutherford or other reasonable officers would have obtained from those cases would be that the use of stun guns and tasers to temporarily incapacitate a suspect would be appropriate when the suspect is advancing toward the officer while armed with a knife threatening an assault or when actively resisting arrest. Thus, in light of that preexisting case law, a reasonable officer in the position of Deputy Rutherford would have believed that his conduct in shooting the beanbag round to temporarily incapacitate the advancing, out of control Deorle who was threatening to physically assault the officer while armed with a container of lighter fluid was be lawful under the circumstances.

The direct conflict between the Ninth Circuit and the Seventh and Eleventh Circuits with respect to the second prong of the qualified immunity test set forth in Saucier, as well as the lack of clearly defined factual scenarios in the use of non-lethal force such as the beanbag rounds, should be reconciled so that there is uniform application of an appropriate legal standard to afford

qualified immunity to peace officers who are alleged to have used excessive force. It is of extreme national importance that the legal standard be known and fully understood by peace officers and law enforcement agencies throughout the country so that peace officers that are constantly confronted with rapidly evolving circumstances will have a better understanding of the constitutional perimeters of their use of less than lethal force. Peace officers already face arguments that in circumstances involving deadly force, they should have been equipped to use other non-deadly force equipment such as beanbag rounds. Yet in this case, when properly trained in the use of beanbag rounds to temporarily incapacitate a suspect or person who needs to be taken into custody so as to cause the least amount of harm to the individual and the officers, the majority panel has denied the application of qualified immunity notwithstanding that the legal standard is not well settled. Peace officers in these situations can only speculate as to whether their conduct is within constitutional boundaries. Petitioner respectfully submits that the law is not clearly established, nor was it in September, 1996, such that Deputy Rutherford could have known that his conduct was unlawful. Therefore, Petitioner respectfully requests that this Court grant this Writ of Certiorari in order to review the Ninth Circuit's opinion and clarify the law governing qualified immunity.

III.

CONCLUSION

Based on the foregoing, Petitioners respectfully submit that this Petition for Writ of Certiorari should be granted.

Dated: February 15, 2002

Respectfully submitted,

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FILED

D11245 FEB 15 2002

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No. _____

In The

SUPREME COURT OF THE UNITED STATES

GREG RUTHERFORD, Butte County Sheriff's Deputy, MICK GREY, Butte County Sheriff, and COUNTY OF BUTTE,
Petitioners,

vs.

RICHARD LEO DEORLE
Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Richard Leo Deorle, *Plaintiff-Appellant*, v. Greg Rutherford, Butte County Deputy Sheriff; Mick Grey, Butte County Sheriff; County of Butte, *Defendants-Appellees.*	No. 99-17188 D.C. No. CV-97-434-LKK ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Eastern District of California
Lawrence K. Karlton, District Judge, Presiding

Argued and Submitted
December 12, 2000 – San Francisco, California

Filed March 16, 2001
Amended Opinion Filed August 31, 2001
Second Amended Opinion Filed November 19, 2001

Before: Myron Bright,* Stephen Reinhardt, and
Barry G. Silverman, Circuit Judges.

Opinion by Judge Reinhardt;
Dissent by Judge Silverman

*The Honorable Myron Bright, Senior United States Circuit Judge for the Eight Circuit, sitting by designation.

ORDER

The majority opinion filed March 16, 2001, as amended August 31, 2001 is further amended as follows:

1) On slip opinion p. 11965, in the paragraph following heading "A. Nature and Qualified Intrusion", replace the citation "*Headwaters Forest Def. v. County of Humbolt*, 240 F.3d 1185, 1198 (9th Cir. 2000) (internal quotation marks omitted) (quoting *Chew*, 27 F.3d at 1440)" with:

"*Headwaters Forest Def. v. County of Humbolt*, 240 F.3d 1185, 1198 (9th Cir. 2000) (vacated and remanded on other grounds sub nom. *County of Humbolt v. Headwaters Forest Def.*, 122 S.Ct. 24 (2001)) (internal quotation marks omitted) (quoting *Chew*, 27 F.3d at 1440)."

2) Replace the paragraph beginning at the bottom of slip opinion p. 11976 with:

> "Although there is no prior case prohibiting the use of this specific type of force in precisely the circumstances here involved, that is insufficient to entitle Rutherford to qualified immunity: notwithstanding the absence of direct precedent, the law may be, as it was here, clearly established. *See Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (rejecting the notion that officer liability cannot exist "unless the very action in question has previously been held unlawful"). Otherwise, officers would escape responsibility for the most egregious forms of conduct simply because there was no case on all fours prohibiting that particular manifestation of unconstitutional conduct. When " 'the defendant['s] conduct is so patently violative of the constitutional right that reasonable officials would know without guidance from the courts' that the action was unconstitutional, closely analogous pre-existing case law is not required to show that the law is clearly established." *Mendoza v. Block*, 27 F.3d 1357, 1361

> (9th Cir. 1994) (quoting *Castell v. Pieschek*, 3 F.3d 1050, 1053 (7th Cir. 1993)). This is such a case. No reasonable officer could have believed that Rutherford's action in shooting Deorle with the "less lethal" lead-filled beanbag round was appropriate or lawful. To the contrary, "it would be clear to a reasonable officer that [Rutherford's] conduct was unlawful. *Katz*, 121 S.Ct. at 2158. It does not matter that no case of this court directly addresses the use of such weapons; we have held that "[a]n officer is not entitled to qualified immunity on the grounds that the law is not clearly established every time a novel method is used to inflict injury." *Mendoza*, 27 F.3d at 1362. Given all the circumstances, the error in judgment, such as it was, does not constitute a "reasonable mistake" of fact or law on Rutherford's part. Viewing the facts in the light most favorable to the plaintiff, Rutherford was not entitled to qualified immunity for his use of excessive force."

Judge Reinhardt has voted to deny Petition for Rehearing En Banc, and Judge Bright has so recommended. Judge Silverman has voted to grant the Petition for Rehearing En Banc.

The full court was advised of the Petition for Rehearing En Banc. An active judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the active judges in favor of en banc consideration. Fed. R. App. P. 35.

The Petition for Rehearing En Banc is therefore denied.

OPINION

REINHARDT, Circuit Judge:

Police Officer Greg Rutherford fired a "less lethal" lead-filled "beanbag round" into the face of Richard Leo Deorle, an emotionally disturbed resident of Butte County, California, who was walking at a "steady gait" in his direction. He did so although Deorle was unarmed, had not attacked or even touched anyone, had generally obeyed the

instructions given him by various police officers, and had not committed any serious offense. Rutherford did not warn Deorle that he would be shot if he physically crossed an undisclosed line or order him to halt. Rutherford simply fired at Deorle when he arrived at a spot Rutherford had predetermined. The projectile Rutherford fired removed Deorle's eye and left lead shot implanted in his skull. We are presented on appeal with two questions: whether the force used was excessive; and, if so, whether Officer Rutherford is nevertheless entitled to qualified immunity because the law was not clearly established or because the officer made an objectively reasonable error in judgment. Both inquiries are a part of the qualified immunity issue on which the district court granted Rutherford summary judgment.

BACKGROUND[1]

On September 9, 1996, in Butte County, California, Richard Deorle (Deorle), upset at being diagnosed with Hepatitis C, and having consumed a half-pint of vodka and some Interferon, his prescribed medication, began behaving erratically. By four o'clock, Deorle had become suicidal. According to Mrs. Deorle, having "lost control of himself," Deorle began screaming and banging on the walls of their house. In search of someone to help her with her distressed husband, Mrs. Deorle dialed 911.[2]

Her call was answered by the police, who dispatched Officer Mahon to the Deorle residence. Mrs. Deorle, accompanied by their children, left the house. Deorle did not hinder their departure. He did, however, rather angrily, refuse to let Mahon enter the house without a warrant. Mahon escorted Deorle's family one block from their house, radioed for "Code 3 Backup," and requested that more officers be sent

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[1] When we review an order granting summary judgment to the defendant, we must view the relevant facts in the light most favorable to the plaintiff. *Margolis v. Ryan*, 140 F.3d 850, 852 (9th Cir. 1998). That standard also applies to our determination of the defendants' entitlement to qualified immunity as a matter of law. *See Moran v. Washington*, 147 F.3d 839, 844 (9th Cir.1998)

[2] Mrs. Deorle testified that, when she dialed 911, Deorle was "just screaming. I don't remember any words, just screaming like in pain." She picked up the phone intending to get medical help, dialed 911, and left the phone on the dresser.

quickly.

At least 13 officers responded to Mahon's request for "backup."[3] These officers set up roadblocks on the streets around the house to ensure that Deorle had no avenue of escape,[4] and awaited the arrival of a Special Incident Response Team ("SIRT") and a team of negotiators. SIRT members are trained to "arrest . . . suspects in the most efficient and least hazardous manner . . . [and] arrest suspect[s] with a minimum amount of risk or danger to the . . . suspect." Negotiators are "[d]eputies trained in the specialized area of crisis negotiations. . . . Their role as negotiator is essential to the successful resolution of critical incidents as it relates to conflict resolution."[5]

Deorle, though verbally abusive, was physically compliant and followed all the officers' instructions. When a canine team "tested" his behavior by making their dog bark aggressively at Deorle, he retreated towards his house. When a wooden board from the porch railings came away in his hands, Deorle dropped it at the officers' command. Although shouting "kill me" and brandishing a hatchet at a police officer, he threw the hatchet away into a clump of trees when told to put it down. Still, Deorle remained agitated and continued to roam on or about the property but well within the police roadblocks. Officer Rutherford, who was at the scene for thirty to forty minutes, did not observe Deorle touch, let alone attack, anyone; nor had he received any

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[3] Rutherford, claims there were between five and ten police officers at Deorle's residence. Appellees' evidence in support of their summary judgment motion suggests that at least thirteen officers were at the scene when Deorle was shot, and a police log indicates that as many as 24 officers may have been present before or immediately after the shooting.

[4] According to the affidavit testimony of various police witnesses, the police secured the area along Creston Road in front of Deorle's house by establishing two roadblocks, one at the intersection of Creston and Sherwood, where Officers Mahon, Muldown, and Collins were stationed, and one at the intersection of Creston and Skyway, staffed by at least two officers, including Officer Hard, but possibly also Sergeant Estes and Officer Johnson. Various officers observed Deorle, who walked up and down Creston Road from one police roadblock to the other and periodically returned to his property or his house.

[5] Butte County Sheriff's Department Special Incident Response Team Tactical Manual at 9, 2.

report of any such action on Deorle's part. He did, however, hear Deorle scream at him that he would "kick his ass."

Rutherford was a member of the SIRT team. He was trained in the deployment of force against recalcitrant suspects and had arrived on the scene in response to Mahon's Code 3 call. After a briefing by his superiors and consultation with another officer on the scene, he decided to reconnoiter closer to Deorle, although the negotiators assigned to handle the incident had not yet arrived. Accompanied by officers Estes and Nichols, Rutherford observed Deorle for about five to ten minutes from the cover of some trees before Deorle, carrying an unloaded plastic crossbow in one hand[6] and what may have been a can or a bottle of lighter fluid in the other,[7] started shouting at the officers. Rutherford was armed with a twelve-gauge shotgun loaded with what appellees term a "less-lethal" or "beanbag" round. These rounds are made of lead shot contained in a cloth sack, and are small enough to be fired from a shotgun.[8] The rounds "could have lethal capabilities" at thirty feet, and are potentially lethal at up to fifty feet.[9]

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[6] The dissent says that it is unclear whether the crossbow was loaded. If it were unclear, we would be required to assume for purposes of summary judgment that it was not loaded. Here, however, Rutherford, himself, acknowledged that the crossbow was unloaded when he observed Deorle. *See* Transcript of Deposition of Greg Rutherford, dated July 29, 1998 at 60:25-26.

[7] In his deposition, Rutherford testified at various times that he observed a plastic bottle in Deorle's hand, but stated equally unequivocally at other points that it was a can that he observed. He also stated that it was lighter fluid that Deorle was carrying because he could tell that from the type of container in Deorle's hand. Indeed, in his deposition, Rutherford said that he could distinguish what type of lighter fluid it was – charcoal lighter fluid rather than that used to fill cigarette lighter – because of its container (apparently, whether that container was a can or a plastic bottle). We also note that Rutherford observed the can or bottle at a distance of more than thirty feet.

[8] The shot is enveloped in cloth to prevent its spreading and peppering the target. The shot, thus encased, is expelled from a twelve-gauge shotgun at a speed of between 280 and 300 feet per second, and delivers a force sufficient to knock someone off his feet and render him incapable of resistance.

[9] Transcript of Deposition of Greg Rutherford, dated July 29, 1998, at 99:23-24.

In response to Deorle's taunts, Rutherford shouted at him to put down the crossbow and Deorle "discarded" it.[10] According to Rutherford, Deorle:

> walk[ed] directly at me at a steady gate [sic]. . . . He didn't run at me, he didn't take his time getting to me, it was just a steady walk directly at me. . . .Once he started walking towards me I took a little wider stance with my feet to get a good stable base. As I leaned my weapon up against the tree to make it more stable and I focused on his lower right rib area as he was walking towards me for a target area.[11]

Rutherford had stationed himself in a garden adjacent to Deorle's house and on its east side. He waited until Deorle, who was walking in an easterly direction on his own property, reached a

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[10] Nowhere in the record is there any mention of any other instruction or order given by Rutherford, or any suggestion that Rutherford told him to drop the bottle or can.

[11] In a statement given to Sergeant Nickelson of the Oroville Police Department on the day in question, Rutherford stated that just prior to shooting Deorle he observed him at a distance of forty feet. Deorle was returning to the grounds of his house from the Sherwood roadblock situated to the west of the house. Rutherford had positioned himself behind a tree in a garden on the east side of the house, between Deorle's property and the Skyway roadblock. According to Sgt. Nickelson, Rutherford told him that he was concerned about "a hostage possibility." "He [Rutherford] said that he was not going to retreat, he knew that he was in a good, secure position. . . . He could not tell if the crossbow was loaded . . . Deputy Rutherford said he already believed that less than lethal rounds would be reasonable use of force in this situation. . . . Deputy Rutherford observed the suspect throw the cross bow to the ground . . . [T]he suspect kept coming closer to him and when the suspect went passed [sic] a similar sized tree, approximately 30 feet away from him, he decided that the subject had approached and was in an uncomfortable position for him. Deputy Rutherford felt he was in jeopardy and if he passed the tree, that he would shoot the subject. Deputy Rutherford said the weapon had already been aimed at the suspect when he noticed him approaching with the cross bow. He said that when the subject got passed [sic] the tree, he shot the round at the subject." Although, after discarding the crossbow, Deorle still possessed a bottle or a can, it appears from Nickelson's report that Rutherford was unable to determine the nature of the container's contents at the time he shot Deorle, and that (be it a bottle or a can) Deorle's possession of the item did not constitute a factor, let alone a significant one, in Rutherford's decision to shoot.

predetermined point, then fired. He did not warn Deorle that he was going to shoot him. He did not ask him to drop the bottle or can. Nor did he order him to halt. The cloth-cased shot struck Deorle in the face, knocked him off his feet, and lodged "half out of his eye." Deorle suffered multiple fractures to his cranium, loss of his left eye, and lead shot embedded in his skull. A team of negotiators was still en route at the time Rutherford shot Deorle.

Deorle sued Rutherford, Mick Grey (the Butte County Sheriff), the County of Butte, and Defense Technology Corporation (the manufacturer of the cloth-cased shot), for, among other things, excessive force in violation of the fourth amendment. Rutherford and Grey asserted qualified immunity and moved for summary judgment. The district court held that Rutherford was entitled to qualified immunity, that he did not violate Deorle's right to be free from excessive force, and that there was therefore no basis for holding the other defendants liable. The court granted summary judgment for defendants and denied Deorle's motion for reconsideration. This appeal followed.[12]

STANDARD OF REVIEW

A court reviews de novo the district court's determination regarding qualified immunity. *See Robinson v. Prunty*, 249 F.3d 862, 865-866 (9th Cir. 2001). A district court's decision to grant summary judgment is also reviewed de novo. *See Crow Tribe of Indians v. Raciot*, 87 F.3d 1039, 1043 (9th Cir. 1996).

DISCUSSION

[1] The Supreme Court has recently determined the manner in which courts are to proceed when, in an excessive force case brought under 42 U.S.C. § 1983, government officials assert the defense of qualified immunity. *See Saucier v. Katz*, ___ U.S. ___, 121 S. Ct. 2151 (2001). A court must "consider[ ] in proper sequence" the "requisites of a qualified immunity defense." *Id.* at 2155. First the court must determine, as a "threshold question," whether the plaintiff has shown

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[12] The excessive-force claim against Officer Rutherford, which reaches us in the form of a challenge to the court's qualified immunity ruling, is the only issue on appeal.

the deprivation of a constitutional right. *Id.* at 2156. *See also Wilson v. Layne*, 526 U.S. 603, 609 (1999). If so, the court must then determine whether the right violated was clearly established in a "particularized . . . sense: . . . the relevant, dispositive inquiry . . . is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Katz*, 121 S. Ct. at 2156. Accordingly, we first examine whether the force used to subdue Deorle was excessive as a matter of law.

I. Excessive Force

[2] We examine the use of force to effect an arrest in light of the Fourth Amendment's prohibition on unreasonable seizures. *Graham v. Connor*, 490 U.S. 386 (1989); *Chew v. Gates*, 27 F.3d 1432, 1440 (1994). The officer's actions are measured by the standard of objective reasonableness, *Graham*, 490 U.S. at 397. The reasonableness of the force used to effect a particular seizure, is determined by "careful[ly] balancing . . . 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' at stake." *Graham*, 490 U.S. at 396 (quoting *Tennessee v. Garner*, 471 U.S. 1, 8 (1985)). As we have held, "[t]he force which [i]s applied must be balanced against the need for that force." *Liston v. County of Riverside*, 120 F.3d 965, 976 (1977). *See also Alexander v. City and County of San Francisco*, 29 F.3d 1355, 1367 (9th Cir. 1994).

A. Nature and Quality of Intrusion

We first assess the quantum of force used to arrest Deorle by considering "the type and amount of force inflicted." *Headwaters Forest Def. v. County of Humbolt*, 240 F.3d 1185, 1198 (9th Cir. 2000) (vacated and remanded on other grounds sub nom. *County of Humbolt v. Headwaters Forest Def.*, 122 S.Ct. 24 (2001)) (internal quotation marks omitted) (quoting *Chew*, 27 F.3d at 1440). In the instant case, Rutherford shot Deorle using a lead-filled, "less-lethal" round.[13] This cloth-cased shot, which is something akin to a rubber bullet, is defined

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[13] The appellees also call the cloth-cased shot a "beanbag" round. That euphemism grossly underrates the dangerousness of this projectile. The round is not some sort of "hackey-sack." It is a projectile capable of inflicting serious injury or death, rather than some children's toy.

as a "long-range impact weapon."[14] It is fired from a 12-gauge shotgun, and calculated to stop "people who are violent or hostile and are threatening injury or death to themselves or others." By Rutherford's own admission, the cloth-cased shot was potentially lethal at thirty feet and could be lethal at distances up to fifty feet. Also by Rutherford's own admission, "[t]he target area for lethal capabilities would probably be the facial area. . . . If it impacted at the heart it could stop the heart or possibly tear a vital artery." Rutherford shot at Deorle's torso from thirty feet: the round hit Deorle in the head and removed his left eye and lodged pieces of lead shot in his skull.

The force used was obviously enough to cause grave physical injury. It knocked Deorle off his feet, and removed one of his eyes. The force applied through use of the cloth-case shot can kill a person if it strikes his head or the left side of his chest at a range of under fifty feet. Such force is much greater than that applied through the use of pepper spray, *see Headwaters Forest*, 240 F.3d at 1203, or a painful compliance hold, *see Forrester v. City of San Diego*, 25 F.3d 804, 806 (9th Cir. 1994)(police force's "pain compliance unit" dispersed demonstrators using "Orcutt Police Nonchakus" – two sticks of wood connected at one end by a cord – or using wrist-and arm-twisting and pressure point holds), and more likely to cause a life-threatening injury than most dog bites. *See Vera Cruz v. City of Escondido*, 139 F.3d 659, 663 (9th Cir. 1997).

[3] However, the cloth-cased shot falls short of deadly force as defined in this circuit: "that force which is reasonably likely to cause *death*." *Vera Cruz*, 139 F.3d at 663 (emphasis added).[15] The shot is not like a regular bullet – it does not normally rip through soft tissue and bone on contact with the human body. It is designed to knock down a

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[14] *See* the affidavit of Peter A. Reedy, a Sergeant with the Sacramento Department Force for 20 years, dated March 16, 1999, and file[illegible]n support of Deorle's opposition to defendants' motion for summary judgment.

[15] The extremely high deadly-force standard enunciated in *Vera Cruz* is unique to this circuit. *See id.* at 662-663. In other circuits the standard is "a substantial risk of causing death *or serious bodily injury*." *See id.* at 661 (emphasis in original), 663 (citing *Ryder v. City of Topeka*, 814 F.2d 1412, 1416 n.11 (10th Cir. 1987); *Pruitt v. City of Montgomery*, 771 F.2d 1475, 1479 n.10 (11th Cir. 1985); *Robinette v. Barnes*, 854 F.2d 909, 912-913 (6th Cir. 1988)).

target, rendering the individual incapable of resistance, without (in the normal course of deployment) resulting in death. Nonetheless, the cloth-cased shot constitutes force which has the capability of causing serious injury, and in some instances does so.[16] According to the affidavit of Sergeant Reedy, "[t]he Use of Force Continuum, as used in California, would list an impact weapon high on the schedule of force."[17] Such force, though less than deadly, is not to be deployed lightly. To put it in terms of the test we apply: the degree of force used by Rutherford is permissible only when a strong governmental interest compels the employment of such force.

B. Governmental Interests at Stake

[4] We measure the governmental interests at stake by evaluating a range of factors: they include " '(1) the severity of the crime at issue, (2) whether the suspect pose[d] an immediate threat to the safety of the officers or others . . . (3) whether he [was] actively resisting arrest or attempting to evade arrest by flight,' and any other 'exigent circumstances [that] existed at the time of the arrest.' " *Headwaters Forest*, 240 F.3d at 1198-99 (quoting *Chew*, 27 F.3d at 1440-1441 & n.5). These factors, however, are simply a means by which to determine objectively "the amount of force that is necessary in a particular situation." *Graham*, 490 U.S. at 396-97.

[5] The character of the offense is often an important consideration in determining whether the use of force was justified. *See Chew*, 27 F.3d at 1442 & n.9; *Headwaters Forest*, 240 F.3d at 1204-1205 (same). In this case, the officers were initially on, or attempting to enter, Deorle's property without a warrant. They arrived, not to arrest him, but to investigate his peculiar behavior. Deorle was clearly a deeply troubled, emotionally disturbed individual. Mrs. Deorle testified that pain, induced by a reaction to his medication, had driven Deorle

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[16] *See, e.g., Student Who Lost Eye Was Shot by Police Using "Non-Lethal Weapon*, S. F. Chron., Apr. 10, 2001 at D 6 (The student was simply observing a riot that occurred following the loss of an NCAA final four basketball game by the University of Arizona when an officer shot him with a "beanbag" round).

[17] Sergeant Reedy offered his expert opinion that "[i]t would be unreasonable for an officer to use an impact weapon on an unarmed person."

"out of control. He just didn't want to live any more." Deorle repeatedly asked officers to shoot him. Lt. Estes, reported that Deorle shouted he "[ha]d no reason to live . . . that the pain was unbearable, and that he wanted to be done with the pain, and that there was no use in continuing." Officer Johnson, Rutherford's superior, heard Deorle asking other officers to kill him. Ultimately, Deorle was charged with nothing more than obstructing the police in the performance of their duties. *See* Cal. Pen. Code § 69.

[6] Rutherford observed Deorle at close proximity for about five to ten minutes before shooting. His testimony is that he fired his shotgun as Deorle was walking towards him, at a steady gait, carrying only a bottle or a can in his hand.[18] Rutherford, who was supposed to be reconnoitering and gathering information for the SIRT team to help determine the nature of the response, instead concluded that he occupied a secure position, that he would not retreat from that position, and that he would shoot if Deorle came within a certain range. He steadied himself against a tree, and waited until Deorle reached that point; then, without a command to stop or a warning that force would be employed, pulled the trigger.

[7] A desire to resolve quickly a potentially dangerous situation is not the type of governmental interest that, standing alone, justifies the use of force that may cause serious injury. There must be other significant circumstances that warrant the use of such a degree of force at the time it is used. *See Headwaters Forest*, 240 F.3d at 1203 (the fact that the police defendants were increasingly frustrated by the protesters – who had developed techniques such as lock-down devices to prolong nonviolent civil protests – is irrelevant under *Graham*). Rutherford testified in his deposition that he shot Deorle to prevent the latter from passing him and thereby posing a menace to Rutherford, the public and other officers.[19] However, a simple statement by an officer that he

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[18] Deorle was wearing no shirt or shoes, only a pair of cut-off jeans shorts. There was nowhere for him to secrete any weapons.

[19] We note that there are certain conflicts between the reasons Rutherford provided to Sergeant Nickelson on the day of the shooting and those that he provided during his deposition. In particular, he initially told Sgt. Nickelson that he believed that Deorle might take a neighbor hostage. Furthermore, he did not identify the can or bottle Deorle was carrying, or its contents, as placing him in any particular danger;

fears for his safety or the safety of others is not enough; there must be objective factors to justify such a concern. In short, an officer's use of force must be objectively reasonable based on his contemporaneous knowledge of the facts. Here, as Rutherford knew, Deorle had discarded his crossbow following Rutherford's instructions to do so, and carried only a bottle or a can with him at the time he was shot. A thorough review of the record reveals that the facts are sufficiently unclear as to what Rutherford believed or feared – reasonable or not – that the determination must be made by a trier of fact, and not, as the dissent does, by portraying the facts in the light most favorable to the moving party.

[8] Rutherford's statements must be considered in light of the objective facts and circumstances. Among them are the following: Rutherford had consulted with his senior officers before deciding to reconnoiter. He knew that roadblocks prevented Deorle leaving the area in front of his house – the area in which he was walking back and forth from time to time – and that a number of officers were stationed at each roadblock. During the forty minutes he had spent at the scene, Rutherford had not observed Deorle attack anyone; nor had he received any report that Deorle had engaged in any such conduct. Deorle had roamed about the area and shouted in an irrational manner, but had not harmed or attempted to harm anyone. Nor had he attempted to flee or escape. "[D]eputies trained in . . . crisis negotiations . . . [whose] role is essential to the successful resolution of critical incidents" were on their way. Rutherford was stationed in a secure position behind a tree, his line of retreat was clear, and Officer Nichols was stationed almost immediately behind him. Rutherford could easily have avoided a confrontation, and awaited the arrival of the negotiating team by retreating to his original position behind the roadblock. Nothing in the record before us suggests that Rutherford considered other, less dangerous, methods of stopping Deorle. *See Headwaters*

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rather, he said, the threat came from Deorle's approach to within thirty feet. By the time of his deposition, Rutherford made no mention of a potential hostage situation, instead stating that he was afraid Deorle would approach a police roadblock, staffed by a number of police officers, which separated Deorle from members of the public. In addition, he firmly identified the can or bottle of lighter fluid as the principal source of his anxiety, and he said that "if [Deorle] got passed [sic] me . . . he could harm . . . myself and other officers," as well as neighbors and bystanders.

Forest, 240 F.3d at 1204 (holding that, before deploying pepper spray, police "were required to consider '[w]hat other tactics if any were available' to effect the arrest"); *Chew*, 27 F.3d at 1443.[20] Rutherford had not seen any bystanders in the immediate area; as far as he was aware, the only neighbors in the vicinity, along with the other police officers, were safely behind the two roadblocks. In sum, the crime being committed, if any, was minor and the danger to Rutherford and others appears to have been minimal, as was the risk of flight. There was no immediate need to subdue Deorle before the negotiators who were part of the response group could arrive and perform their "essential function"; nor had those in charge made a decision to subject Deorle to the use of physical force rather than await their arrival. Considering all the circumstances at the time Rutherford fired, the governmental interest in using force capable of causing serious injury was clearly not substantial.

C. Weighing the Conflicting Interests

Whether Rutherford's shooting of Deorle was objectively reasonable requires us to consider whether the degree of force used was necessary, *see Liston*, 120 F.3d at 976, in other words, whether the degree of force used was warranted by the governmental interests at stake. *See Graham*, 490 U.S. at 396. Here, given all the circumstances – the large number of police officers present, the pending arrival of the negotiators "essential to resolve [such] critical incidents"; the nature of Deorle's conduct (essentially disturbing the peace); Deorle's compliance with the prior commands of the officers; the absence of any physical assault; Deorle's having discarded the crossbow when told to do so and being unarmed at the time he was fired upon – the fact that Deorle was walking on his own property in Rutherford's direction with a can or bottle in his hand is insufficient by any objective measure to justify the force deployed. Our conclusion is strongly supported by Rutherford's failure to give Deorle any warning that he would be shot if he

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[20] We note, incidentally, that other officers used a police dog to provoke Deorle: a "police tactic that needlessly or unreasonably creates a dangerous situation necessitating an escalation in the use of force," and a course of action this circuit has expressly refused to endorse. *See Cunningham v. Gates*, 229 F.3d 1271, 1291 n.23 (9th Cir. 2000).

approached any closer, or any order to drop the can or bottle or stop where he was: Deorle certainly could not have been expected to comply with instructions that were never given to him.

[9] The problems posed by, and thus the tactics to be employed against, an unarmed, emotionally distraught individual who is creating a disturbance or resisting arrest are ordinarily different from those involved in law enforcement efforts to subdue an armed and dangerous criminal who has recently committed a serious offense. In the former instance, increasing the use of force may, in some circumstances at least, exacerbate the situation; in the latter, a heightened use of less-than-lethal force will usually be helpful in bringing a dangerous situation to a swift end. In the case of mentally unbalanced persons, the use of officers and others trained in the art of counseling is ordinarily advisable, where feasible, and may provide the best means of ending a crisis. *See Alexander*, 29 F.3d at 1366 (holding that the police used excessive force, considering all the circumstances, in "storm[ing] the house of a man whom they knew to be a mentally ill . . . recluse who had threatened to shoot anybody who entered").[21] Even when an emotionally disturbed individual is "acting out" and inviting officers to use deadly force to subdue him, the governmental interest in using such force is diminished by the fact that the officers are confronted, not with a person who has committed a serious crime against others, but with a mentally ill individual. We do not adopt a per se rule establishing two different classifications of suspects: mentally disabled persons and serious criminals. Instead, we emphasize that where it is or should be apparent to the officers that the individual involved is emotionally disturbed, that is a factor that must be considered in determining, under *Graham*, the reasonableness of the force employed.

We also recognize that police officers' decisions about the

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[21] In fact, we suggested that the plaintiff could properly argue at trial "that if the police had halted their activities and then gotten an arrest warrant, this too might have avoided the final tragic confrontation. Given the delay attendant in obtaining the warrant, the police might well have sent the gathered city officials away, and then, without the pressure of their presence, and without the expectation that an inspection could be conducted any time soon, might have allowed events to unfold more slowly." *Id.* at 1365. In other words, we suggested that the waiting period was likely to diffuse a potentially violent situation and prevent loss of life, rather than the contrary.

appropriate amount of force to use in a given circumstance "are often . . . split-second judgments [made] in circumstances that are tense, uncertain, and rapidly evolving." *Graham*, 490 U.S. at 396-97; *see also Washington v. Lambert*, 98 F.3d 1181, 1186 (9th Cir. 1996). However, the situation here was far from that of a lone police officer suddenly confronted by a dangerous armed felon threatening immediate violence: Deorle was eventually charged only with the relatively minor crime of obstructing the police in their effort to subdue him. Rutherford and a host of other officers were at the scene for over half an hour before Rutherford shot the emotionally disturbed Deorle. Rutherford had had an opportunity to observe Deorle for a considerable period of time prior to firing at him. He also had the opportunity to consult with his superiors concerning the tactics to be employed. *Compare Chew*, 27 F.3d at 1142. Moreover, Rutherford possessed a clear line of escape from the position he assumed and a police roadblock or buffer zone had been established behind him. Rutherford and the other officers were awaiting the arrival of skilled negotiators, trained to persuade individuals like Deorle to submit peacefully. The negotiating team had left the station and was on its way to the scene. Nevertheless, Rutherford contemplated shooting Deorle with the "less lethal" round during the entire time Deorle was walking in his direction from the roadblock. In sum, with knowledge of all the relevant circumstances, Rutherford made a calculated and deliberate decision to shoot Deorle when Deorle reached a particular point in his peregrinations: and that is precisely what he did.

[10] The absence of a warning or an order to halt is also a factor that influences our decision. Shooting a person who is making a disturbance because he walks in the direction of an officer at a steady gait with a can or bottle in his hand is clearly not objectively reasonable. Certainly it is not objectively reasonable to do so when the officer neither orders the individual to stop nor to drop the can or bottle, and does not even warn him that he will be fired upon if he fails to halt. Appropriate warnings comport with actual police practice. Our cases demonstrate that officers provide warnings, where feasible, even when the force used is less than deadly. *See Brewer v. City of Napa*, 210 F.3d 1093, 1094-1095 (9th Cir. 2000)(police officer gave warning before setting dog on suspect); *Vera Cruz*, 139 F.3d at 660 (same); *Headwaters Forest*, 240 F.3d at 1193-94 (police warned protesters before use of pepper spray). We do not hold, however, that warnings

are required whenever less than deadly force is employed. Rather, we simply determine that such warnings should be given, when feasible, if the use of force may result in serious injury, and that the giving of a warning or the failure to do so is a factor to be considered in applying the *Graham* balancing test. In the present case, the desirability and feasibility of a warning are obvious. Deorle might never have passed the unannounced, pre-determined spot selected by Rutherford had Rutherford given him a warning or a command to halt. There was ample time to give that order or warning and no reason whatsoever not to do so.[22]

[11] Viewing the facts presented by the record in the light we must, we conclude that even though Rutherford used force that is classified in this circuit as less than deadly, and that would have been so classified in other circuits as well, the force was excessive compared to the governmental interests at stake. The dissent insists that the undisputed fact is that the force used against Deorle is not reasonably likely to cause serious injury. The "reasonably likely to cause serious injury" inquiry is a part of the deadly-force determination in all other circuits that have defined "deadly force." We have, wisely or not, rejected the test all others employ. *See* n.15, *supra*. In any event, in the case before us, the question is not whether the force was "deadly." The evidence in the record before us makes it clear that, "deadly" or not, the force used by Rutherford is capable of causing serious injury to the

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[22] Rutherford does not remember giving a warning; nor do any of the other eleven witnesses mention his doing so when describing the events they saw or heard. At oral argument, appellee's counsel claimed that it was Rutherford's usual practice to give a warning, where possible, before shooting. While Rutherford's testimony to that effect would not have changed our analysis, there is no evidence in the record before us that supports counsel's claim, and certainly no foundational evidence, such as how many times Rutherford had shot people in the past. At most, Rutherford may have shouted "less-lethal." Officer Estes claims to have heard Rutherford shout "less lethal" before firing. Officer Smith claims Rutherford shouted "less-lethal," but cannot remember whether it was before or after the shot was fired. It is just as likely that both officers heard Lt. Nichols who admitted that he shouted "less than lethal" after Rutherford fired the cloth-cased shot "so other officers would know what had occurred." That cryptic statement was insufficient to alert a target that force would be deployed, let alone that he would be shot, particularly as the purpose of the announcement was, as Lt. Nichols indicated, otherwise.

person shot, and that such injury may occur in any given instance.[23] Less than deadly force, like deadly force, may not be used without sufficient reason; rather, it is subject to the *Graham* balancing test. *Chew*, 27 F.3d at 1442. Less than deadly force that may lead to serious injury may be used only when a strong governmental interest warrants its use, and in such circumstances should be preceded by a warning, when feasible. *Id.* at 1442-1433. Under the fourth-amendment objective-reasonableness standard, the shooting violated Deorle's right to be free from unreasonable seizures. *See Graham*, 490 U.S. at 396 (applying *Garner*, 471 U.S. at 8-9). We now consider whether Rutherford is protected by the defense of qualified immunity.

II. Qualified Immunity

[12] Rutherford, who was sued in his individual capacity for violating § 1983, has raised the affirmative defense of qualified immunity. The doctrine of qualified immunity insulates government agents against personal liability for money damages for actions taken in good faith pursuant to their discretionary authority. *See Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982). More specifically, "governmental officials . . . generally are shielded from liability for civil damages insofar as their conduct as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." 457 U.S. at 818.

[13] Here, the test is not simply a reiteration of the *Graham* test which we applied, above: rather, we must determine whether, in using excessive force, the officer made a "reasonable mistake[ ] as to the legality of [his] actions." *Katz*, 121 S. Ct. at 2158. We assume, *arguendo*, that Rutherford thought that the force he used was not excessive; however, that is not the issue. Rather, the question is whether Rutherford's use of force was premised on a *reasonable* belief that such force was lawful, or, as the Supreme Court recently put it: "whether it would be clear to a reasonable officer that his conduct was

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[23] To examine the prospects of serious injury, as does the dissent, on the basis of the assumption that a shot from a shotgun will hit the precise part of the body at which it is aimed by the shooter, is not only unsupported by the record, but contrary to the experience and training of law enforcement agencies. It is hardly unusual for bullets or lead-filled beanbags fired from shotguns to be off the mark.

unlawful in the situation he confronted." *Id.* at 2156. The Court also explained the purpose of the rule: "[q]ualified immunity operates . . . to protect officers from the sometimes hazy border between excessive and acceptable force." *Id.* at 2158. It helps, therefore, to begin our discussion with the observation that, on the basis of the facts we have discussed, this is by no means a borderline case. It should have been clear to any reasonable officer that, under the circumstances present, firing at Deorle was objectively unreasonable.

Every police officer should know that it is objectively unreasonable to shoot – even with lead shot wrapped in a cloth case – an unarmed man who: has committed no serious offense, is mentally or emotionally disturbed, has been given no warning of the imminent use of such a significant degree of force, poses no risk of flight, and presents no objectively reasonable threat to the safety of the officer or other individuals. Here, all those factors were present. Deorle had complied with the police officers' instructions, had discarded his potential weapons whenever asked to do so, and has not assaulted anyone; in addition, a team of negotiators essential to resolving such situations was en route.

[14] Although there is no prior case prohibiting the use of this specific type of force in precisely the circumstances here involved, that is insufficient to entitle Rutherford to qualified immunity: notwithstanding the absence of direct precedent, the law may be, as it was here, clearly established. *See Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (rejecting the notion that officer liability cannot exist "unless the very action in question has previously been held unlawful"). Otherwise, officers would escape responsibility for the most egregious forms of conduct simply because there was no case on all fours prohibiting that particular manifestation of unconstitutional conduct. When " 'the defendant['s] conduct is so patently violative of the constitutional right that reasonable officials would know without guidance from the courts' that the action was unconstitutional, closely analogous pre-existing case law is not required to show that the law is clearly established." *Mendoza v. Block*, 27 F.3d 1357, 1361 (9th Cir. 1994) (quoting *Castell v. Pieschek*, 3 F.3d 1050, 1053 (7th Cir. 1993)). This is such a case. No reasonable officer could have believed that Rutherford's action in shooting Deorle with the "less lethal" lead-filled beanbag round was appropriate or lawful. To the contrary, "it would

be clear to a reasonable officer that [Rutherford's] conduct was unlawful. *Katz*, 121 S.Ct. at 2158. It does not matter that no case of this court directly addresses the use of such weapons; we have held that "[a]n officer is not entitled to qualified immunity on the grounds that the law is not clearly established every time a novel method is used to inflict injury." *Mendoza*, 27 F.3d at 1362. Given all the circumstances, the error in judgment, such as it was, does not constitute a "reasonable mistake" of fact or law on Rutherford's part. Viewing the facts in the light most favorable to the plaintiff, Rutherford was not entitled to qualified immunity for his use of excessive force.

CONCLUSION

Viewing the facts in the light we must, we conclude that, for purposes of summary judgment:

> Rutherford's use of force was excessive and the defense of qualified immunity is unavailing. The degree of force was plainly in excess of the governmental interest at stake. The law was clear that Rutherford's shooting Deorle was in violation of Deorle's constitutional rights, and there was no reasonable basis for any factual or legal misperception on Rutherford's part: no reasonable officer could have concluded that the force employed was appropriate or lawful.

Accordingly, we reverse the grant of summary judgment and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

SILVERMAN, Circuit Judge, dissenting:

The essential facts are not disputed. Plaintiff Richard Deorle was deranged and out of control when Deorle's wife made her 911 call to the police. When Deorle saw his wife on the telephone calling for help, he told her that they would have to come kill him.

After the first deputy sheriff (Mahon) arrived at the scene,

Deorle was observed holding a two-by-six board with nails protruding from the end of it. According to Mrs. Deorle's taped-recorded statement on the day in question, Deorle "was so angry, that he just started lifting up the porch, you know the board, it has a railing and he lifted up the railing and he was like swinging it" like a baseball bat. At her deposition held three years later, Mrs. Deorle stated that he was "screaming" but not swinging the board around. Either way, the undisputed fact is that Deorle, while screaming and on a rampage, was in possession of a board with protruding nails, and that he finally dropped it when Mahon took his pistol out of his holster.

Mahon was able to get Deorle's wife and children safely into his patrol car. Mrs. Deorle told Mahon that Deorle was depressed, that he had been drinking, that he was in a rage caused by his medication, that he previously had been arrested for assaulting her in a domestic incident, and that he had been on probation.

It is undisputed that after dropping the board, Deorle picked up two hatchets and a crossbow. According to Mrs. Deorle, the crossbow was of the type used for recreational target shooting, not hunting, and that "it does look serious." In her tape-recorded interview, she recalled that when the police on the scene asked her whether her husband had any weapons, she told them, "No, except he has a crossbow."[1]

Lt. Estes heard Deorle say that he wanted to die and that he would kill anyone who came on his property. It was around this time that Deputy Rutherford arrived on the scene and was briefed on all of the above. Deorle dropped the hatchets, but continued to hold the crossbow in his right hand. In his left hand he was carrying a can of lighter fluid. He dropped the crossbow, advanced toward Rutherford and then said something to the effect of, "I'm going to kick your ass, mother-fucker."

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[1] It is unclear whether the crossbow was loaded. However, two days after the incident, when asked in a recorded interview about whether the crossbow as loaded, Deorle replied, "Yeah, but shit, it wouldn't even put a hole in that wall right here." He also stated that the crossbow fired a "little arrow" that "basically" had a standard point like on a normal arrow. There is nothing in the record to suggest that the crossbow was a child's toy or looked like one.

It is undisputed that Rutherford was trained in the proper use of the so-called beanbag round, which was designed to knockdown and incapacitate a person so that an arrest can be effected. The majority is right; it is not a toy, but it is not designed to kill or injury. To the contrary, it is designed to prevent serious injury. Although virtually anything can cause death or serious injury under the right circumstances and the beanbag round is no exception, *see Vera Cruz v. City of Escondido*, 139 F.3d 659 (9th Cir. 1998), the undisputed evidence established that the firing of a beanbag round from a 12-gauge shotgun at a person's "center mass" from a distance of 20 to 40 feet is not reasonably likely to cause death or serious injury. Furthermore, the evidence is uncontradicted that the beanbag round was fired at Deorle's lower right abdomen but that it suddenly "flew up" and unexpectedly and unintentionally hit Deorle in the face.[2]

Under *Saucier v. Katz*, 121 S. Ct. 2151 (2001), the first issue is whether, taken in the light most favorable to Deorle, the facts show that a constitutional right was violated. The undisputed facts show that it was not. Deorle may have been sick, he may have been deranged, but that did not make him any less dangerous to the officers who responded to Mrs. Deorle's call for help. Deorle advanced toward Rutherford, threatening to harm him, while brandishing a quart can of lighter fluid. Rutherford had no duty to wait to be doused with a flammable liquid or to be set ablaze before acting to protect himself. The majority's insistence of portraying Deorle as unarmed is simply incorrect. He was armed with a container of lighter fluid and was advancing toward Rutherford while threatening to kick his ass. Rutherford may not have had the right to use deadly force at that point, but he had every right to protect himself with a degree of force likely only to temporarily incapacitate. That is what he did.

True, Rutherford did not issue a warning before firing the beanbag round at the advancing Deorle, but there is no telling, even in hindsight, what Deorle might have done had a warning been issued. Only a short time earlier, Deorle told his wife that he wanted to die and that if the police came on his property they would have to kill him –

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[2] It is interesting to note that the declaration of retired Sacramento Police Department Sgt. Peter A. Reedy, which is referred to twice in the majority opinion, contains not one word indicating that Sgt. Reedy has any experience, training or expertise with beanbag rounds.

and Rutherford knew that. Deorle might have surrendered, but he also might have attempted to set Rutherford on fire or engage in self-immolation. Deorle also might have kept on coming, and if he got closer than 20 feet away, the beanbag round could not have been sued. Then hand-to-hand combat would have been inevitable, which is not without its own serious, sometimes life-threatening, risks to suspects and officers alike. Under the circumstances, it was not objectively unreasonable for Rutherford to attempt to safely and preemptively subdue him as he did. *See Graham v. Connor*, 490 U.S. 386 (1989). As the Court said in *Saucier*, "If an officer reasonably, but mistakenly, believed that a suspect was likely to fight back, for instance, the officer would be justified in using more force than in fact was needed." 121 S. Ct. at 2158. Under *Saucier*, that should end the inquiry.

But even if Rutherford were mistaken about whether the amount of force he used was legal in the circumstances, the issue under the second part of the *Saucier* sequential analysis becomes whether the officer's *mistake* was reasonable. *Id.* "An officer might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances. If the officer's mistake as to what the law requires is reasonable, however, the officer is entitled to the immunity defense." *Id.* This turns on whether the officer's conduct violated a "clearly established rule." *Id.* at 2160.

The facts outlined above demonstrate that Rutherford's response to Deorle's threatening actions, even if excessive, even if mistaken, was not an unreasonable mistake. It did not violate any clearly established rule. It is undisputed that he deployed a degree of force that he was trained to use and that he reasonably believed would subdue the advancing and threatening Deorle without doing any significant harm. Neither Deorle nor the majority, as required by the Supreme Court, "has identified any case demonstrating a clearly established rule prohibiting the officer from acting as he did." *Id.* The majority admits that "there is no prior case prohibiting the use of this specific type of force in precisely the circumstances here involved." Majority Op. at 11976. In fact, the best the majority can come up with is cases involving the use of pain compliance techniques, not in self-defense, but to disperse nonviolent protestors (*Forrester v. City of San Diego*, 25 F.3d 804 (9th Cir. 1994); *Headwaters Forest Def. v. County of Humbolt*, 240 F.3d 1185

(9th Cir. 2000)). Likewise, *Alexander v. City and County of San Francisco*, 29 F.3d 1355, 1366 (9th Cir. 1994) concerns the circumstances under which the police may storm a house, not self-defense. Neither *Brewer v. City of Napa*, 210 F.3d 1093 (9th Cir. 2000) nor *Headwaters Forest* held that warnings are required before deploying force. But even if they did, which they don't, they were decided four years *after* Rutherford's encounter with Deorle.

Because I believe that Rutherford was entitled to qualified immunity, I would affirm the granting of summary judgment in his favor and in favor of the Sheriff of Butte County. Accordingly, I respectfully dissent.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Richard Leo Deorle,
Plaintiff-Appellant,

v.

Greg Rutherford, Butte County Deputy Sheriff; Mick Grey, Butte County Sheriff; County of Butte,
Defendants-Appellees.
_____/

No. 99-17188

D.C. No.
CV-97-434-LKK

AMENDED OPINION

Appeal from the United States District Court
for the Eastern District of California
Lawrence K. Karlton, District Judge, Presiding

Argued and Submitted
December 12, 2000 – San Francisco, California

Filed March 16, 2001
Amended Opinion Filed August 31, 2001

Before: Myron Bright,* Stephen Reinhardt, and
Barry G. Silverman, Circuit Judges.

Opinion by Judge Reinhardt;
Dissent by Judge Silverman

*The Honorable Myron Bright, Senior United States Circuit Judge for the Eight Circuit, sitting by designation.

OPINION

REINHARDT, Circuit Judge:

Police Officer Greg Rutherford fired a "less lethal" lead-filled "beanbag round" into the face of Richard Leo Deorle, an emotionally disturbed resident of Butte County, California, who was walking at a "steady gait" in his direction. He did so although Deorle was unarmed, had not attacked or even touched anyone, had generally obeyed the instructions given him by various police officers, and had not committed any serious offense. Rutherford did not warn Deorle that he would be shot if he physically crossed an undisclosed line or order him to halt. Rutherford simply fired at Deorle when he arrived at a spot Rutherford had predetermined. The projectile Rutherford fired removed Deorle's eye and left lead shot implanted in his skull. We are presented on appeal with two questions: whether the force used was excessive; and, if so, whether Officer Rutherford is nevertheless entitled to qualified immunity because the law was not clearly established or because the officer made an objectively reasonable error in judgment. Both inquiries are a part of the qualified immunity issue on which the district court granted Rutherford summary judgment.

BACKGROUND[1]

On September 9, 1996, in Butte County, California, Richard Deorle (Deorle), upset at being diagnosed with Hepatitis C, and having consumed a half-pint of vodka and some Interferon, his prescribed medication, began behaving erratically. By four o'clock, Deorle had become suicidal. According to Mrs. Deorle, having "lost control of himself," Deorle began screaming and banging on the walls of their house. In search of someone to help her with her distressed husband,

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[1] When we review an order granting summary judgment to the defendant, we must view the relevant facts in the light most favorable to the plaintiff. *Margolis v. Ryan*, 140 F.3d 850, 852 (9th Cir. 1998). That standard also applies to our determination of the defendants' entitlement to qualified immunity as a matter of law. *See Moran v. Washington*, 147 F.3d 839, 844 (9th Cir.1998)

Mrs. Deorle dialed 911.[2]

Her call was answered by the police, who dispatched Officer Mahon to the Deorle residence. Mrs. Deorle, accompanied by their children, left the house. Deorle did not hinder their departure. He did, however, rather angrily, refuse to let Mahon enter the house without a warrant. Mahon escorted Deorle's family one block from their house, radioed for "Code 3 Backup," and requested that more officers be sent quickly.

At least 13 officers responded to Mahon's request for "backup."[3] These officers set up roadblocks on the streets around the house to ensure that Deorle had no avenue of escape,[4] and awaited the arrival of a Special Incident Response Team ("SIRT") and a team of negotiators. SIRT members are trained to "arrest . . . suspects in the most efficient and least hazardous manner . . . [and] arrest suspect[s] with a minimum amount of risk or danger to the . . . suspect." Negotiators are "[d]eputies trained in the specialized area of crisis negotiations. . . . Their role as negotiator is essential to the successful resolution of critical incidents as it relates to conflict resolution."[5]

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[2] Mrs. Deorle testified that, when she dialed 911, Deorle was "just screaming. I don't remember any words, just screaming like in pain." She picked up the phone intending to get medical help, dialed 911, and left the phone on the dresser.

[3] Rutherford, claims there were between five and ten police officers at Deorle's residence. Appellees' evidence in support of their summary judgment motion suggests that at least thirteen officers were at the scene when Deorle was shot, and a police log indicates that as many as 24 officers may have been present before or immediately after the shooting.

[4] According to the affidavit testimony of various police witnesses, the police secured the area along Creston Road in front of Deorle's house by establishing two roadblocks, one at the intersection of Creston and Sherwood, where Officers Mahon, Muldown, and Collins were stationed, and one at the intersection of Creston and Skyway, staffed by at least two officers, including Officer Hard, but possibly also Sergeant Estes and Officer Johnson. Various officers observed Deorle, who walked up and down Creston Road from one police roadblock to the other and periodically returned to his property or his house.

[5] Butte County Sheriff's Department Special Incident Response Team Tactical Manual at 9, 2.

Deorle, though verbally , was physically compliant and generally followed all the officers' instructions. When a canine team "tested" his behavior by making their dog bark aggressively at Deorle, he retreated towards his house. When a wooden board from the porch railings came away in his hands, Deorle dropped it at the officers' command. Although shouting "kill me" and brandishing a hatchet at a police officer, he threw the hatchet away into a clump of trees when told to put it down. Still, Deorle remained agitated and continued to roam on or about the property but well within the police roadblocks. Officer Rutherford, who was at the scene for thirty to forty minutes, did not observe Deorle touch, let alone attack, anyone; nor had he received any report of any such action on Deorle's part. He did, however, hear Deorle scream at him that he would "kick his ass."

Rutherford was a member of the SIRT team. He was trained in the deployment of force against recalcitrant suspects and had arrived on the scene in response to Mahon's Code 3 call. After a briefing by his superiors and consultation with another officer on the scene, he decided to reconnoiter closer to Deorle, although the negotiators assigned to handle the incident had not yet arrived. Accompanied by officers Estes and Nichols, Rutherford observed Deorle for about five to ten minutes from the cover of some trees before Deorle, carrying an unloaded plastic crossbow in one hand[6] and what may have been a can or a bottle of lighter fluid in the other,[7] started shouting at the officers. Rutherford was armed with a twelve-gauge shotgun loaded with what appellees

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[6] The dissent says that it is unclear whether the crossbow was loaded. If it were unclear, we would be required to assume for purposes of summary judgment that it was not loaded. Here, however, Rutherford, himself, acknowledged that the crossbow was unloaded when he observed Deorle. *See* Transcript of Deposition of Greg Rutherford, dated July 29, 1998 at 60:25-26.

[7] In his deposition, Rutherford testified at various times that he observed a plastic bottle in Deorle's hand, but stated equally unequivocally at other points that it was a can that he observed. He also stated that it was lighter fluid that Deorle was carrying because he could tell that from the type of container in Deorle's hand. Indeed, in his deposition, Rutherford said that he could distinguish what type of lighter fluid it was – charcoal lighter fluid rather than that used to fill cigarette lighters – because of its container (apparently, whether that container was a can or a plastic bottle). We also note that Rutherfford observed the can or bottle at a distance of more than thirty feet.

term a "less-lethal" or "beanbag" round. These rounds are made of lead shot contained in a cloth sack, and are small enough to be fired from a shotgun.[8] The rounds "could have lethal capabilities" at thirty feet, and are potentially lethal at up to fifty feet.[9]

In response to Deorle's taunts, Rutherford shouted at him to put down the crossbow and Deorle "discarded" it.[10] According to Rutherford, Deorle:

> walk[ed] directly at me at a steady gate [sic]. . . . He didn't run at me, he didn't take his time getting to me, it was just a steady walk directly at me. . . .Once he started walking towards me I took a little wider stance with my feet to get a good stable base. As I leaned my weapon up against the tree to make it more stable and I focused on his lower right rib area as he was walking towards me for a target area.[11]

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[8] The shot is enveloped in cloth to prevent its spreading and peppering the target. The shot, thus encased, is expelled from a twelve-gauge shotgun at a speed of between 280 and 300 feet per second, and delivers a force sufficient to knock someone off his feet and render him incapable of resistance.

[9] Transcript of Deposition of Greg Rutherford, dated July 29, 1998, at 99:23-24.

[10] Nowhere in the record is there any mention of any other instruction or order given by Rutherford, or any suggestion that Rutherford told him to drop the bottle or can.

[11] In a statement given to Sergeant Nickelson of the Oroville Police Department on the day in question, Rutherford stated that just prior to shooting Deorle he observed him at a distance of forty feet. Deorle was returning to the grounds of his house from the Sherwood roadblock situated to the west of the house. Rutherford had positioned himself behind a tree in a garden on the east side of the house, between Deorle's property and the Skyway roadblock. According to Sgt. Nickelson, Rutherford told him that he was concerned about "a hostage possibility." "He [Rutherford] said that he was not going to retreat, he knew that he was in a good, secure position. . . . He could not tell if the crossbow was loaded . . . Deputy Rutherford said he already believed that less than lethal rounds would be reasonable use of force in this situation. . . . Deputy Rutherford observed the suspect throw the cross bow to the ground . . . [T]he suspect kept coming closer to him and when the suspect went passed [sic] a similar sized tree, approximately 30 feet away from him, he decided that the subject

Rutherford had stationed himself in a garden adjacent to Deorle's house and on its east side. He waited until Deorle, who was walking in an easterly direction on his own property, reached a predetermined point, then fired. He did not warn Deorle that he was going to shoot him. He did not ask him to drop the bottle or can. Nor did he order him to halt. The cloth-cased shot struck Deorle in the face, knocked him off his feet, and lodged "half out of his eye." Deorle suffered multiple fractures to his cranium, loss of his left eye, and lead shot embedded in his skull. A team of negotiators was still en route at the time Rutherford shot Deorle.

Deorle sued Rutherford, Mick Grey (the Butte County Sheriff), the County of Butte, and Defense Technology Corporation (the manufacturer of the cloth-cased shot), for, among other things, excessive force in violation of the fourth amendment. Rutherford and Grey asserted qualified immunity and moved for summary judgment. The district court held that Rutherford was entitled to qualified immunity, that he did not violate Deorle's right to be free from excessive force, and that there was therefore no basis for holding the other defendants liable. The court granted summary judgment for defendants and denied Deorle's motion for reconsideration. This appeal followed.[12]

STANDARD OF REVIEW

A court reviews de novo the district court's determination regarding qualified immunity. *See Robinson v. Prunty*, 249 F.3d 862, 865-866 (9th Cir. 2001). A district court's decision to grant summary

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had approached and was in an uncomfortable position for him. Deputy Rutherford felt he was in jeopardy and if he passed the tree, that he would shoot the subject. Deputy Rutherford said the weapon had already been aimed at the suspect when he noticed him approaching with the cross bow. He said that when the subject got passed [sic] the tree, he shot the round at the subject." Although, after discarding the crossbow, Deorle still possessed a bottle or a can, it appears from Nickelson's report that Rutherford was unable to determine the nature of the container's contents at the time he shot Deorle, and that (be it a bottle or a can) Deorle's possession of the item did not constitute a factor, let alone a significant one, in Rutherford's decision to shoot.

[12] The excessive-force claim against Officer Rutherford, which reaches us in the form of a challenge to the court's qualified immunity ruling, is the only issue on appeal.

judgment is also reviewed de novo. *See Crow Tribe of Indians v. Raciot*, 87 F.3d 1039, 1043 (9th Cir. 1996).

DISCUSSION

[1] The Supreme Court has recently determined the manner in which courts are to proceed when, in an excessive force case brought under 42 U.S.C. § 1983, government officials assert the defense of qualified immunity. *See Saucier v. Katz*, ___ U.S. ___, 121 S. Ct. 2151 (2001). A court must "consider[ ] in proper sequence" the "requisites of a qualified immunity defense." *Id.* at 2155. First the court must determine, as a "threshold question," whether the plaintiff has shown the deprivation of a constitutional right. *Id.* at 2156. *See also Wilson v. Layne*, 526 U.S. 603, 609 (1999). If so, the court must then determine whether the right violated was clearly established in a "particularized . . . sense: . . . the relevant, dispositive inquiry . . . is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Katz*, 121 S. Ct. at 2156. Accordingly, we first examine whether the force used to subdue Deorle was excessive as a matter of law.

I. Excessive Force

[2] We examine the use of force to effect an arrest in light of the Fourth Amendment's prohibition on unreasonable seizures. *Graham v. Connor*, 490 U.S. 386 (1989); *Chew v. Gates*, 27 F.3d 1432, 1440 (1994). The officer's actions are measured by the standard of objective reasonableness, *Graham*, 490 U.S. at 397. The reasonableness of the force used to effect a particular seizure, is determined by "careful[ly] balancing . . . 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' at stake." *Graham*, 490 U.S. at 396 (quoting *Tennessee v. Garner*, 471 U.S. 1, 8 (1985)). As we have held, "[t]he force which [i]s applied must be balanced against the need for that force." *Liston v. County of Riverside*, 120 F.3d 965, 976 (1977). *See also Alexander v. City and County of San Francisco*, 29 F.3d 1355, 1367 (9th Cir. 1994).

A. Nature and Quality of Intrusion

We first assess the quantum of force used to arrest Deorle by

considering "the type and amount of force inflicted." *Headwaters Forest Def. v. County of Humbolt*, 240 F.3d 1185, 1198 (9th Cir. 2000)(internal quotation marks omitted)(quoting *Chew*, 27 F.3d at 1440). In the instant case, Rutherford shot Deorle using a lead-filled, "less-lethal" round.[13] This cloth-cased shot, which is something akin to a rubber bullet, is defined as a "long-range impact weapon."[14] It is fired from a 12-gauge shotgun, and calculated to stop "people who are violent or hostile and are threatening injury or death to themselves or others." By Rutherford's own admission, the cloth-cased shot was potentially lethal at thirty feet and could be lethal at distances up to fifty feet. Also by Rutherford's own admission, "[t]he target area for lethal capabilities would probably be the facial area. . . . If it impacted at the heart it could stop the heart or possibly tear a vital artery." Rutherford shot at Deorle's torso from thirty feet: the round hit Deorle in the head and removed his left eye and lodged pieces of lead shot in his skull.

The force used was obviously enough to cause grave physical injury. It knocked Deorle off his feet, and removed one of his eyes. The force applied through use of the cloth-case shot can kill a person if it strikes his head or the left side of his chest at a range of under fifty feet. Such force is much greater than that applied through the use of pepper spray, *see Headwaters Forest*, 240 F.3d at 1203, or a painful compliance hold, *see Forrester v. City of San Diego*, 25 F.3d 804, 806 (9th Cir. 1994)(police force's "pain compliance unit" dispersed demonstrators using "Orcutt Police Nonchakus" – two sticks of wood connected at one end by a cord – or using wrist-and arm-twisting and pressure point holds), and more likely to cause a life-threatening injury than most dog bites. *See Vera Cruz v. City of Escondido*, 139 F.3d 659, 663 (9th Cir. 1997).

[3] However, the cloth-cased shot falls short of deadly force as

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[13] The appellees also call the cloth-cased shot a "beanbag" round. That euphemism grossly underrates the dangerousness of this projectile. The round is not some sort of "hackey-sack." It is a projectile capable of inflicting serious injury or death, rather than some children's toy.

[14] *See* the affidavit of Peter A. Reedy, a Sergeant with the Sacramento Department Force for 20 years, dated March 16, 1999, and filed in support of Deorle's opposition to defendants' motion for summary judgment.

defined in this circuit: "that force which is reasonably likely to cause *death*." *Vera Cruz*, 139 F.3d at 663 (emphasis added).[15] The shot is not like a regular bullet – it does not normally rip through soft tissue and bone on contact with the human body. It is designed to knock down a target, rendering the individual incapable of resistance, without (in the normal course of deployment) resulting in death. Nonetheless, the cloth-cased shot constitutes force which has the capability of causing serious injury, and in some instances does so.[16] According to the affidavit of Sergeant Reedy, "[t]he Use of Force Continuum, as used in California, would list an impact weapon high on the schedule of force."[17] Such force, though less than deadly, is not to be deployed lightly. To put it in terms of the test we apply: the degree of force used by Rutherford is permissible only when a strong governmental interest compels the employment of such force.

B. Governmental Interests at Stake

[4] We measure the governmental interests at stake by evaluating a range of factors: they include " '(1) the severity of the crime at issue, (2) whether the suspect pose[d] an immediate threat to the safety of the officers or others . . . (3) whether he [was] actively resisting arrest or attempting to evade arrest by flight,' and any other 'exigent circumstances [that] existed at the time of the arrest.' " *Headwaters Forest*, 240 F.3d at 1198-99 (quoting *Chew*, 27 F.3d at 1440-1441 & n.5). These factors, however, are simply a means by which to determine objectively "the amount of force that is necessary

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[15] The extremely high deadly-force standard enunciated in *Vera Cruz* is unique to this circuit. *See id.* at 662-663. In other circuits the standard is "a substantial risk of causing death *or serious bodily injury*." *See id.* at 661 (emphasis in original), 663 (citing *Ryder v. City of Topeka*, 814 F.2d 1412, 1416 n.11 (10th Cir. 1987); *Pruitt v. City of Montgomery*, 771 F.2d 1475, 1479 n.10 (11th Cir. 1985); *Robinette v. Barnes*, 854 F.2d 909, 912-913 (6th Cir. 1988)).

[16] *See, e.g., Student Who Lost Eye Was Shot by Police Using "Non-Lethal Weapon*, S. F. Chron., Apr. 10, 2001 at D 6 (The student was simply observing a riot that occurred following the loss of an NCAA final four basketball game by the University of Arizona when an officer shot him with a "beanbag" round).

[17] Sergeant Reedy offered his expert opinion that "[i]t would be unreasonable for an officer to use an impact weapon on an unarmed person."

in a particular situation." *Graham*, 490 U.S. at 396-97.

[5] The character of the offense is often an important consideration in determining whether the use of force was justified. *See Chew*, 27 F.3d at 1442 & n.9; *Headwaters Forest*, 240 F.3d at 1204-1205 (same). In this case, the officers were initially on, or attempting to enter, Deorle's property without a warrant. They arrived, not to arrest him, but to investigate his peculiar behavior. Deorle was clearly a deeply troubled, emotionally disturbed individual. Mrs. Deorle testified that pain, induced by a reaction to his medication, had driven Deorle "out of control. He just didn't want to live any more." Deorle repeatedly asked officers to shoot him. Lt. Estes, reported that Deorle shouted he "[ha]d no reason to live . . . that the pain was unbearable, and that he wanted to be done with the pain, and that there was no use in continuing." Officer Johnson, Rutherford's superior, heard Deorle asking other officers to kill him. Ultimately, Deorle was charged with nothing more than obstructing the police in the performance of their duties. *See* Cal. Pen. Code § 69.

[6] Rutherford observed Deorle at close proximity for about five to ten minutes before shooting. His testimony is that he fired his shotgun as Deorle was walking towards him, at a steady gait, carrying only a bottle or a can in his hand.[18] Rutherford, who was supposed to be reconnoitering and gathering information for the SIRT team to help determine the nature of the response, instead concluded that he occupied a secure position, that he would not retreat from that position, and that he would shoot if Deorle came within a certain range. He steadied himself against a tree, and waited until Deorle reached that point; then, without a command to stop or a warning that force would be employed, pulled the trigger.

[7] A desire to resolve quickly a potentially dangerous situation is not the type of governmental interest that, standing alone, justifies the use of force that may cause serious injury. There must be other significant circumstances that warrant the use of such a degree of force at the time it is used. *See Headwaters Forest*, 240 F.3d at 1203 (the fact that the police defendants were increasingly frustrated by the protesters

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[18] Deorle was wearing no shirt or shoes, only a pair of cut-off jeans shorts. There was nowhere for him to secrete any weapons.

– who had developed techniques such as lock-down devices to prolong nonviolent civil protests – is irrelevant under *Graham*). Rutherford testified in his deposition that he shot Deorle to prevent the latter from passing him and thereby posing a menace to Rutherford, the public and other officers.[19] However, a simple statement by an officer that he fears for his safety or the safety of others is not enough; there must be objective factors to justify such a concern. In short, an officer's use of force must be objectively reasonable based on his contemporaneous knowledge of the facts. Here, as Rutherford knew, Deorle had discarded his crossbow following Rutherford's instructions to do so, and carried only a bottle or a can with him at the time he was shot. A thorough review of the record reveals that the facts are sufficiently unclear as to what Rutherford believed or feared – reasonable or not – that the determination must be made by a trier of fact, and not, as the dissent does, by portraying the facts in the light most favorable to the moving party.

[8] Rutherford's statements must be considered in light of the objective facts and circumstances. Among them are the following: Rutherford had consulted with his senior officers before deciding to reconnoiter. He knew that roadblocks prevented Deorle leaving the area in front of his house – the area in which he was walking back and forth from time to time – and that a number of officers were stationed at each roadblock. During the forty minutes he had spent at the scene, Rutherford had not observed Deorle attack anyone; nor had he received any report that Deorle had engaged in any such conduct. Deorle had roamed about the area and shouted in an irrational manner, but had not harmed or attempted to harm anyone. Nor had he attempted to

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[19] We note that there are certain conflicts between the reasons Rutherford provided to Sergeant Nickelson on the day of the shooting and those that he provided during his deposition. In particular, he initially told Sgt. Nickelson that he believed that Deorle might take a neighbor hostage. Furthermore, he did not identify the can or bottle Deorle was carrying, or its contents, as placing him in any particular danger; rather, he said, the threat came from Deorle's approach to within thirty feet. By the time of his deposition, Rutherford made no mention of a potential hostage situation, instead stating that he was afraid Deorle would approach a police roadblock, staffed by a number of police officers, which separated Deorle from members of the public. In addition, he firmly identified the can or bottle of lighter fluid as the principal source of his anxiety, and he said that "if [Deorle] got passed [sic] me . . . he could harm . . . myself and other officers," as well as neighbors and bystanders.

flee or escape. "[D]eputies trained in . . . crisis negotiations . . . [whose] role is essential to the successful resolution of critical incidents" were on their way. Rutherford was stationed in a secure position behind a tree, his line of retreat was clear, and Officer Nichols was stationed almost immediately behind him. Rutherford could easily have avoided a confrontation, and awaited the arrival of the negotiating team by retreating to his original position behind the roadblock. Nothing in the record before us suggests that Rutherford considered other, less dangerous, methods of stopping Deorle. *See Headwaters Forest*, 240 F.3d at 1204 (holding that, before deploying pepper spray, police "were required to consider '[w]hat other tactics if any were available' to effect the arrest"); *Chew*, 27 F.3d at 1443.[20] Rutherford had not seen any bystanders in the immediate area; as far as he was aware, the only neighbors in the vicinity, along with the other police officers, were safely behind the two roadblocks. In sum, the crime being committed, if any, was minor and the danger to Rutherford and others appears to have been minimal, as was the risk of flight. There was no immediate need to subdue Deorle before the negotiators who were part of the response group could arrive and perform their "essential function"; nor had those in charge made a decision to subject Deorle to the use of physical force rather than await their arrival. Considering all the circumstances, at the time Rutherford fired, the governmental interest in using force capable of causing serious injury was clearly not substantial.

C. Weighing the Conflicting Interests

Whether Rutherford's shooting of Deorle was objectively reasonable requires us to consider whether the degree of force used was necessary, *see Liston*, 120 F.3d at 976, in other words, whether the degree of force used was warranted by the governmental interests at stake. *See Graham*, 490 U.S. at 396. Here, given all the circumstances – the large number of police officers present, the pending arrival of the

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[20] We note, incidentally, that other officers used a police dog to provoke Deorle: a "police tactic that needlessly or unreasonably creates a dangerous situation necessitating an escalation in the use of force," and a course of action this circuit has expressly refused to endorse. *See Cunningham v. Gates*, 229 F.3d 1271, 1291 n.23 (9th Cir. 2000).

negotiators "essential to resolve [such] critical incidents"; the nature of Deorle's conduct (essentially disturbing the peace); Deorle's compliance with the prior commands of the officers; the absence of any physical assault; Deorle's having discarded the crossbow when told to do so and being unarmed at the time he was fired upon – the fact that Deorle was walking on his own property in Rutherford's direction with a can or bottle in his hand is insufficient by any objective measure to justify the force deployed. Our conclusion is strongly supported by Rutherford's failure to give Deorle any warning that he would be shot if he approached any closer, or any order to drop the can or bottle or stop where he was: Deorle certainly could not have been expected to comply with instructions that were never given to him.

[9] The problems posed by, and thus the tactics to be employed against, an unarmed, emotionally distraught individual who is creating a disturbance or resisting arrest are ordinarily different from those involved in law enforcement efforts to subdue an armed and dangerous criminal who has recently committed a serious offense. In the former instance, increasing the use of force may, in some circumstances at least, exacerbate the situation; in the latter, a heightened use of less-than-lethal force will usually be helpful in bringing a dangerous situation to a swift end. In the case of mentally unbalanced persons, the use of officers and others trained in the art of counseling is ordinarily advisable, where feasible, and may provide the best means of ending a crisis. *See Alexander*, 29 F.3d at 1366 (holding that the police used excessive force, considering all the circumstances, in "storm[ing] the house of a man whom they knew to be a mentally ill . . . recluse who had threatened to shoot anybody who entered").[21] Even when an emotionally disturbed individual is "acting out" and inviting officers to use deadly force to subdue him, the governmental interest in using such force is diminished by the fact that the officers are confronted, not with a person who has committed a serious crime

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[21] In fact, we suggested that the plaintiff could properly argue at trial "that if the police had halted their activities and then gotten an arrest warrant, this too might have avoided the final tragic confrontation. Given the delay attendant in obtaining the warrant, the police might well have sent the gathered city officials away, and then, without the pressure of their presence, and without the expectation that an inspection could be conducted any time soon, might have allowed events to unfold more slowly." *Id.* at 1365. In other words, we suggested that the waiting period was likely to diffuse a potentially violent situation and prevent loss of life, rather than the contrary.

against others, but with a mentally ill individual. We do not adopt a per se rule establishing two different classifications of suspects: mentally disabled persons and serious criminals. Instead, we emphasize that where it is or should be apparent to the officers that the individual involved is emotionally disturbed, that is a factor that must be considered in determining, under *Graham*, the reasonableness of the force employed.

We also recognize that police officers' decisions about the appropriate amount of force to use in a given circumstance "are often . . . "split-second judgments [made] in circumstances that are tense, uncertain, and rapidly evolving." *Graham*, 490 U.S. at 396-97; *see also Washington v. Lambert*, 98 F.3d 1181, 1186 (9th Cir. 1996). However, the situation here was far from that of a lone police officer suddenly confronted by a dangerous armed felon threatening immediate violence: Deorle was eventually charged only with the relatively minor crime of obstructing the police in their effort to subdue him. Rutherford and a host of other officers were at the scene for over half an hour before Rutherford shot the emotionally disturbed Deorle. Rutherford had had an opportunity to observe Deorle for a considerable period of time prior to firing at him. He also had the opportunity to consult with his superiors concerning the tactics to be employed. *Compare Chew*, 27 F.3d at 1142. Moreover, Rutherford possessed a clear line of escape from the position he assumed and a police roadblock or buffer zone had been established behind him. Rutherford and the other officers were awaiting the arrival of skilled negotiators, trained to persuade individuals like Deorle to submit peacefully. The negotiating team had left the station and was on its way to the scene. Nevertheless, Rutherford contemplated shooting Deorle with the "less lethal" round during the entire time Deorle was walking in his direction from the roadblock. In sum, with knowledge of all the relevant circumstances, Rutherford made a calculated and deliberate decision to shoot Deorle when Deorle reached a particular point in his peregrinations: and that is precisely what he did.

[10] The absence of a warning or an order to halt is also a factor that influences our decision. Shooting a person who is making a disturbance because he walks in the direction of an officer at a steady gait with a can or bottle in his hand is clearly not objectively reasonable. Certainly it is not objectively reasonable to do so when the

officer neither orders the individual to stop nor to drop the can or bottle, and does not even warn him that he will be fired upon if he fails to halt. Appropriate warnings comport with actual police practice. Our cases demonstrate that officers provide warnings, where feasible, even when the force used is less than deadly. *See Brewer v. City of Napa*, 210 F.3d 1093, 1094-1095 (9th Cir. 2000)(police officer gave warning before setting dog on suspect); *Vera Cruz*, 139 F.3d at 660 (same); *Headwaters Forest*, 240 F.3d at 1193-94 (police warned protesters before use of pepper spray). We do not hold, however, that warnings are required whenever less than deadly force is employed. Rather, we simply determine that such warnings should be given, when feasible, if the use of force may result in serious injury, and that the giving of a warning or the failure to do so is a factor to be considered in applying the *Graham* balancing test. In the present case, the desirability and feasibility of a warning are obvious. Deorle might never have passed the unannounced, pre-determined spot selected by Rutherford had Rutherford given him a warning or a command to halt. There was ample time to give that order or warning and no reason whatsoever not to do so.[22]

[11] Viewing the facts presented by the record in the light we must, we conclude that even though Rutherford used force that is classified in this circuit as less than deadly, and that would have been so classified in other circuits as well, the force was excessive compared to the governmental interests at stake. The dissent insists that the undisputed fact is that the force used against Deorle is not reasonably

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[22] Rutherford does not remember giving a warning; nor do any of the other eleven witnesses mention his doing so when describing the events they saw or heard. At oral argument, appellee's counsel claimed that it was Rutherford's usual practice to give a warning, where possible, before shooting. While Rutherford's testimony to that effect would not have changed our analysis, there is no evidence in the record before us that supports counsel's claim, and certainly no foundational evidence, such as how many times Rutherford had shot people in the past. At most, Rutherford may have shouted "less-lethal." Officer Estes claims to have heard Rutherford shout "less-lethal" before firing. Officer Smith claims Rutherford shouted "less-lethal," but cannot remember whether it was before or after the shot was fired. It is just as likely that both officers heard Lt. Nichols who admitted that he shouted "less than lethal" after Rutherford fired the cloth-cased shot "so other officers would know what had occurred." That cryptic statement was insufficient to alert a target that force would be deployed, let alone that he would be shot, particularly as the purpose of the announcement was, as Lt. Nichols indicated, otherwise.

likely to cause serious injury. The "reasonably likely to cause serious injury" inquiry is a part of the deadly-force determination in all other circuits that have defined "deadly force." We have, wisely or not, rejected the test all others employ. *See* n.15, *supra*. In any event, in the case before us, the question is not whether the force was "deadly." The evidence in the record before us makes it clear that, "deadly" or not, the force used by Rutherford is capable of causing serious injury to the person shot, and that such injury may occur in any given instance.[23] Less than deadly force, like deadly force, may not be used without sufficient reason; rather, it is subject to the *Graham* balancing test. *Chew*, 27 F.3d at 1442. Less than deadly force that may lead to serious injury may be used only when a strong governmental interest warrants its use, and in such circumstances should be preceded by a warning, when feasible. *Id.* at 1442-1433. Under the fourth-amendment objective-reasonableness standard, the shooting violated Deorle's right to be free from unreasonable seizures. *See Graham*, 490 U.S. at 396 (applying *Garner*, 471 U.S. at 8-9). We now consider whether Rutherford is protected by the defense of qualified immunity.

II. Qualified Immunity

[12] Rutherford, who was sued in his individual capacity for violating § 1983, has raised the affirmative defense of qualified immunity. The doctrine of qualified immunity insulates government agents against personal liability for money damages for actions taken in good faith pursuant to their discretionary authority. *See Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982). More specifically, "governmental officials . . . generally are shielded from liability for civil damages insofar as their conduct as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." 457 U.S. at 818.

[13] Here, the test is not simply a reiteration of the *Graham* test which we applied, above: rather, we must determine whether, in using

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[23] To examine the prospects of serious injury, as does the dissent, on the basis of the assumption that a shot from a shotgun will hit the precise part of the body at which it is aimed by the shooter, is not only unsupported by the record, but contrary to the experience and training of law enforcement agencies. It is hardly unusual for bullets or lead-filled beanbags fired from shotguns to be off the mark.

excessive force, the officer made a "reasonable mistake[ ] as to the legality of [his] actions." *Katz*, 121 S. Ct. at 2158. We assume, *arguendo*, that Rutherford thought that the force he used was not excessive; however, that is not the issue. Rather, the question is whether Rutherford's use of force was premised on a *reasonable* belief that such force was lawful, or, as the Supreme Court recently put it: "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* at 2156. The Court also explained the purpose of the rule: "[q]ualified immunity operates . . . to protect officers from the sometimes hazy border between excessive and acceptable force." *Id.* at 2158. It helps, therefore, to begin our discussion with the observation that, on the basis of the facts we have discussed, this is by no means a borderline case. It should have been clear to any reasonable officer that, under the circumstances present, firing at Deorle was objectively unreasonable.

Every police officer should know that it is objectively unreasonable to shoot – even with lead shot wrapped in a cloth case – an unarmed man who: has committed no serious offense, is mentally or emotionally disturbed, has been given no warning of the imminent use of such a significant degree of force, poses no risk of flight, and presents no objectively reasonable threat to the safety of the officer or other individuals. Here, all those factors were present. Deorle had complied with the police officers' instructions, had discarded his potential weapons whenever asked to do so, and has not assaulted anyone; in addition, a team of negotiators essential to resolving such situations was en route.

[14] Although there is no prior case prohibiting the use of this specific type of force in precisely the circumstances here involved, that is insufficient to entitle Rutherford to qualified immunity: notwithstanding the absence of direct precedent, the law may be, as it was here, clearly established. *See DeBoer v. Pennington*, 206 F.3d 857, 864-865 (9th Cir. 2000). Otherwise, officers would escape responsibility for the most egregious forms of conduct simply because there was no case on all fours prohibiting that particular manifestation of unconstitutional conduct. When "the defendant['s] conduct is so patently violative of the constitutional right that reasonable officials would know without guidance from the courts that the action was unconstitutional, closely analogous pre-existing case law is not required

to show that the law is clearly established." *DeBoer*, 206 F.3d at 864-865. This is such a case. No reasonable officer could have believed that Rutherford's action in shooting Deorle with the "less lethal" lead-filled beanbag round was appropriate or lawful. To the contrary, "it would be clear to a reasonable officer that [Rutherford's] conduct was unlawful." *Katz*, 121 S. Ct. at 2158. Given all the circumstances, the error in judgment, such as it was, does not constitute a "reasonable mistake" of fact or law on Rutherford's part. Viewing the facts in the light most favorable to the plaintiff, Rutherford was not entitled to qualified immunity for his use of excessive force.

CONCLUSION

Viewing the facts in the light we must, we conclude that, for purposes of summary judgment:

> Rutherford's use of force was excessive and the defense of qualified immunity is unavailing. The degree of force was plainly in excess of the governmental interest at stake. The law was clear that Rutherford's shooting Deorle was in violation of Deorle's constitutional rights, and there was no reasonable basis for any factual or legal misperception on Rutherford's part: no reasonable officer could have concluded that the force employed was appropriate or lawful.

Accordingly, we reverse the grant of summary judgment and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

SILVERMAN, Circuit Judge, dissenting:

The essential facts are not disputed. Plaintiff Richard Deorle was deranged and out of control when Deorle's wife made her 911 call to the police. When Deorle saw his wife on the telephone calling for help, he told her that they would have to come kill him.

After the first deputy sheriff (Mahon) arrived at the scene,

Deorle was observed holding a two-by-six board with nails protruding from the end of it. According to Mrs. Deorle's taped-recorded statement on the day in question, Deorle "was so angry, that he just started lifting up the porch, you know the board, it has a railing and he lifted up the railing and he was like swinging it" like a baseball bat. At her deposition held three years later, Mrs. Deorle stated that he was "screaming" but not swinging the board around. Either way, the undisputed fact is that Deorle, while screaming and on a rampage, was in possession of a board with protruding nails, and that he finally dropped it when Mahon took his pistol out of his holster.

Mahon was able to get Deorle's wife and children safely into his patrol car. Mrs. Deorle told Mahon that Deorle was depressed, that he had been drinking, that he was in a rage caused by his medication, that he previously had been arrested for assaulting her in a domestic incident, and that he had been on probation.

It is undisputed that after dropping the board, Deorle picked up two hatchets and a crossbow. According to Mrs. Deorle, the crossbow was of the type used for recreational target shooting, not hunting, and that "it does look serious." In her tape-recorded interview, she recalled that when the police on the scene asked her whether her husband had any weapons, she told them, "No, except he has a crossbow."[1]

Lt. Estes heard Deorle say that he wanted to die and that he would kill anyone who came on his property. It was around this time that Deputy Rutherford arrived on the scene and was briefed on all of the above. Deorle dropped the hatchets, but continued to hold the crossbow in his right hand. In his left hand he was carrying a can of lighter fluid. He dropped the crossbow, advanced toward Rutherford and then said something to the effect of, "I'm going to kick your ass, mother-fucker."

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[1] It is unclear whether the crossbow was loaded. However, two days after the incident, when asked in a recorded interview about whether the crossbow as loaded, Deorle replied, "Yeah, but shit, it wouldn't even put a hole in that wall right here." He also stated that the crossbow fired a "little arrow" that "basically" had a standard point like on a normal arrow. There is nothing in the record to suggest that the crossbow was a child's toy or looked like one.

It is undisputed that Rutherford was trained in the proper use of the so-called beanbag round, which was designed to knockdown and incapacitate a person so that an arrest can be effected. The majority is right; it is not a toy, but it is not designed to kill or injury. To the contrary, it is designed to prevent serious injury. Although virtually anything can cause death or serious injury under the right circumstances and the beanbag round is no exception, *see Vera Cruz v. City of Escondido*, 139 F.3d 659 (9th Cir. 1998), the undisputed evidence established that the firing of a beanbag round from a 12-gauge shotgun at a person's "center mass" from a distance of 20 to 40 feet is not reasonably likely to cause death or serious injury. Furthermore, the evidence is uncontradicted that the beanbag round was fired at Deorle's lower right abdomen but that it suddenly "flew up" and unexpectedly and unintentionally hit Deorle in the face.[2]

Under *Saucier v. Katz*, 121 S. Ct. 2151 (2001), the first issue is whether, taken in the light most favorable to Deorle, the facts show that a constitutional right was violated. The undisputed facts show that it was not. Deorle may have been sick, he may have been deranged, but that did not make him any less dangerous to the officers who responded to Mrs. Deorle's call for help. Deorle advanced toward Rutherford, threatening to harm him, while brandishing a quart can of lighter fluid. Rutherford had no duty to wait to be doused with a flammable liquid or to be set ablaze before acting to protect himself. The majority's insistence of portraying Deorle as unarmed is simply incorrect. He was armed with a container of lighter fluid and was advancing toward Rutherford while threatening to kick his ass. Rutherford may not have had the right to use deadly force at that point, but he had every right to protect himself with a degree of force likely only to temporarily incapacitate. That is what he did.

True, Rutherford did not issue a warning before firing the beanbag round at the advancing Deorle, but there is no telling, even in hindsight, what Deorle might have done had a warning been issued. Only a short time earlier, Deorle told his wife that he wanted to die and that if the police came on his property they would have to kill him –

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[2] It is interesting to note that the declaration of retired Sacramento Police Department Sgt. Peter A. Reedy, which is referred to twice in the majority opinion, contains not one word indicating that Sgt. Reedy has any experience, training or expertise with beanbag rounds.

and Rutherford knew that. Deorle might have surrendered, but he also might have attempted to set Rutherford on fire or engage in self-immolation. Deorle also might have kept on coming, and if he got closer than 20 feet away, the beanbag round could not have been sued. Then hand-to-hand combat would have been inevitable, which is not without its own serious, sometimes life-threatening, risks to suspects and officers alike. Under the circumstances, it was not objectively unreasonable for Rutherford to attempt to safely and preemptively subdue him as he did. *See Graham v. Connor*, 490 U.S. 386 (1989). As the Court said in *Saucier*, "If an officer reasonably, but mistakenly, believed that a suspect was likely to fight back, for instance, the officer would be justified in using more force than in fact was needed." 121 S. Ct. at 2158. Under *Saucier*, that should end the inquiry.

But even if Rutherford were mistaken about whether the amount of force he used was legal in the circumstances, the issue under the second part of the *Saucier* sequential analysis becomes whether the officer's *mistake* was reasonable. *Id.* "An officer might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances. If the officer's mistake as to what the law requires is reasonable, however, the officer is entitled to the immunity defense." *Id.* This turns on whether the officer's conduct violated a "clearly established rule." *Id.* at 2160.

The facts outlined above demonstrate that Rutherford's response to Deorle's threatening actions, even if excessive, even if mistaken, was not an unreasonable mistake. It did not violate any clearly established rule. It is undisputed that he deployed a degree of force that he was trained to use and that he reasonably believed would subdue the advancing and threatening Deorle without doing any significant harm. Neither Deorle nor the majority, as required by the Supreme Court, "has identified any case demonstrating a clearly established rule prohibiting the officer from acting as he did." *Id.* The majority admits that "there is no prior case prohibiting the use of this specific type of force in precisely the circumstances here involved." Majority Op. at 11976. In fact, the best the majority can come up with is cases involving the use of pain compliance techniques, not in self-defense, but to disperse nonviolent protestors (*Forrester v. City of San Diego*, 25 F.3d 804 (9th Cir. 1994); *Headwaters Forest Def. v. County of Humbolt*, 240 F.3d 1185

(9th Cir. 2000)). Likewise, *Alexander v. City and County of San Francisco*, 29 F.3d 1355, 1366 (9th Cir. 1994) concerns the circumstances under which the police may storm a house, not self-defense. Neither *Brewer v. City of Napa*, 210 F.3d 1093 (9th Cir. 2000) nor *Headwaters Forest* held that warnings are required before deploying force. But even if they did, which they don't, they were decided four years *after* Rutherford's encounter with Deorle.

Because I believe that Rutherford was entitled to qualified immunity, I would affirm the granting of summary judgment in his favor and in favor of the Sheriff of Butte County. Accordingly, I respectfully dissent.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Richard Leo Deorle,
Plaintiff-Appellant,

v.

Greg Rutherford, Butte County Deputy Sheriff; Mick Grey, Butte County Sheriff; County of Butte,
Defendants-Appellees.

_____/

No. 99-17188

D.C. No.
CV-97-434-LKK

OPINION

Appeal from the United States District Court
for the Eastern District of California
Lawrence K. Karlton, District Judge, Presiding

Argued and Submitted
December 12, 2000 – San Francisco, California

Filed March 16, 2001

Before: Myron Bright,* Stephen Reinhardt, and
Barry G. Silverman, Circuit Judges.

Opinion by Judge Reinhardt;
Dissent by Judge Silverman

*The Honorable Myron Bright, Senior United States Circuit Judge for the Eight Circuit, sitting by designation.

OPINION

REINHARDT, Circuit Judge:

Police Officer Greg Rutherford fired a "less lethal" lead-filled "beanbag round" into the face of Richard Leo Deorle, an emotionally disturbed resident of Butte County, California. Deorle was shot without receiving a warning and while unarmed. The projectile removed an eye and left lead shot implanted in his skull. We are presented on appeal with two issues: whether the force used was so excessive as to violate Deorle's fourth amendment rights; and, if so, whether Officer Rutherford is entitled to qualified immunity.

BACKGROUND[3]

On September 9, 1996, in Butte County, California, Richard Deorle (Deorle), upset at being diagnosed with Hepatitis C, and having consumed a half-pint of vodka and some Interferon, his prescribed medication, began behaving erratically. By four o'clock, Deorle had become suicidal. According to Mrs. Deorle, having "lost control of himself," Deorle began screaming and banging on the walls of their house. In search of someone to help her with her distressed husband, Mrs. Deorle dialed 911.[4]

Her call was answered by the police, who dispatched Officer Mahon to the Deorle residence. Mrs. Deorle, accompanied by their children, left the house. Deorle did not hinder their departure. He did, however, rather angrily, refuse to let Mahon enter the house without a warrant. Mahon escorted Deorle's family one block from their house, radioed for "Code 3 Backup," and requested that more officers be sent

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[3] When we review an order granting summary judgment to the defendant, we must view the relevant facts in the light most favorable to the plaintiff. *Margolis v. Ryan*, 140 F.3d 850, 852 (9th Cir. 1998). That standard also applies to our determination of the defendants' entitlement to qualified immunity as a matter of law. *See Moran v. Washington*, 147 F.3d 839, 844 (9th Cir.1998)

[4] Mrs. Deorle testified that, when she dialed 911, Deorle was "just screaming. I don't remember any words, just screaming like in pain." She picked up the phone intending to get medical help, dialed 911, and left the phone on the dresser.

quickly.

At least 13 officers responded to Mahon's request for "backup."[5] These officers set up roadblocks on the streets around the house to ensure that Deorle had no avenue of escape, and awaited the arrival of a Special Incident Response Team ("SIRT") and a team of negotiators. SIRT members are trained to "arrest . . . suspects in the most efficient and least hazardous manner . . . [and] arrest suspect[s] with a minimum amount of risk or danger to the . . . suspect."

Deorle, though verbally intimidating, was physically compliant and followed all the officers' instructions. When a canine team "tested" his behavior by making their dog bark aggressively at Deorle, he retreated towards his house. When a wooden board from the porch railings came away in his hands, Deorle dropped it at the officers' command. Although shouting "kill me" and brandishing a hatchet at a police officer, he threw the hatchet away into a clump of trees when told to put it down. Officer Rutherford, who was at the scene for thirty to forty minutes, did not observe Deorle touch, let alone attack, anyone; he did, however, hear Deorle scream at him that he would "kick his ass."[6]

Rutherford was a member of the SIRT team. He was trained in the deployment of force against recalcitrant suspects and had arrived on the scene in response to Mahon's Code 3 call. After briefing by his superiors and consultation with another officer on the scene, he decided to reconnoiter closer to Deorle. Accompanied by officers Estes and Nichols, Rutherford observed Deorle for about five to ten minutes from the cover of some trees before Deorle, carrying an unloaded plastic

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[5] Rutherford, claims there were between five and ten police officers at Deorle's residence. Appellees' evidence in support of their summary judgment motion suggests that at least thirteen officers were at the scene when Deorle was shot, and a police log indicates that as many as 24 officers may have been present before or immediately after the shooting.

[6] Rutherford also stated that no-one reported to him that Deorle had touched or attacked anyone.

crossbow in one hand[7] and what may have been a bottle of charcoal lighter fluid in the other,[8] started shouting at the officers. Rutherford was armed with a twelve-gauge shotgun loaded with what appellees term a "less-lethal" or "beanbag" round. These rounds are made of lead shot contained in a cloth sack, and are small enough to be fired from a shotgun.[9] The rounds "could have lethal capabilities" at thirty feet, and are potentially lethal up to fifty feet.[10]

In response to Deorle's taunts, Rutherford shouted at him to put down the crossbow and Deorle "discarded" it.[11] According to Rutherford, Deorle then:

> walk[ed] directly at me at a steady gate [sic]. . . . He didn't run at me, he didn't take his time getting to me, it was just a steady walk directly at me. . . .Once he started walking towards me I took a little wider stance

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[7] The dissent says that it is unclear whether the crossbow was loaded. If it were unclear, we would be required to assume for purposes of summary judgment that the crossbow was not loaded. Here, however, Rutherford, himself, acknowledged that the crossbow was unloaded when he observed Deorle. *See* Transcript of Deposition of Greg Rutherford, dated July 29, 1998 at 60:25-26.

[8] In his deposition, Rutherford testified at various times that he observed a plastic bottle in Deorle's hand, but stated equally unequivocally at other points that it was a can that he observed. He also stated that it was lighter fluid that Deorle was carrying because he could tell that from the type of container in Deorle's hand. Indeed, Rutherford said he could distinguish what type of lighter fluid it was – charcoal lighter fluid rather than that used to fill cigarette lighters – because of its container (apparently, whether that container was a can or a plastic bottle). We also note that Rutherford observed the can or bottle at a distance of more than thirty feet.

[9] The shot is enveloped in cloth to prevent its spreading and peppering the target. The shot, thus encased, is expelled from a twelve-gauge shotgun at a speed of between 280 and 300 feet per second, and delivers a force sufficient to knock someone off his feet and render him incapable of resistance.

[10] Transcript of Deposition of Greg Rutherford, dated July 29, 1998, at 99:23-24.

[11] Nowhere in the record is there any mention of any other instruction or order given by Rutherford.

> with my feet to get a good stable base. As I leaned my weapon up against the tree to make it more stable and I focused on his lower right rib area as he was walking towards me for a target area.[12]

Rutherford did not warn Deorle that he was going to shoot him. Nor did he order Deorle to halt. Instead, he waited until Deorle reached the predetermined point, then fired. The cloth-cased shot struck Deorle in the face, knocked him off his feet, and lodged "half out of his eye." He suffered multiple fractures to his cranium, loss of his left eye, and embedded lead shot in his skull. A team of negotiators was still en route when Deorle was shot.

Deorle sued Rutherford, Mick Grey (the Butte County Sheriff), the County of Butte, and Defense Technology Corporation (the manufacturer of the cloth-cased shot), for, among other things, excessive force in violation of the fourth amendment. Rutherford and Grey asserted qualified immunity and moved for summary judgment. The district court held that Rutherford was entitled to qualified immunity, that he did not violate Deorle's right to be free from excessive force, and that there was therefore no basis for holding the other defendants liable. The court granted summary judgment for defendants and denied Deorle's motion for reconsideration. This appeal followed. The excessive-force claim against Officer Rutherford, which was dispositive in the court below, is the only issue presented by the parties on appeal.

STANDARD OF REVIEW

A court reviews de novo the issue of whether an officer's use of force was objectively reasonable under the circumstances. *See Liston v. County of Riverside*, 120 F.3d 965, 976 (1997). A district court's

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[12] In a statement given to Oroville Police Department Sgt. Nicholson on the day of the shooting, Rutherford stated that "the suspect kept coming closer to him and when the suspect went passed [sic] a similar sized tree, approximately 30 feet away from him, he decided that the subject had approached and was in an uncomfortable position for him. Deputy Rutherford felt he was in jeopardy and if he passed the tree, that he would shoot the subject. Deputy Rutherford said the weapon had already been aimed at the suspect when he noticed him approaching with the cross bow. He said that when the subject got passed [sic] the tree, he shot the round at the subject."

decision to grant summary judgment is also reviewed de novo. *See Crow Tribe of Indians v. Raciot*, 87 F.3d 1039, 1043 (9th Cir. 1996).

DISCUSSION

[1] When government officials assert the defense of qualified immunity to an action under 42 U.S.C. § 1983, a court evaluating the defense must first determine whether the plaintiff has shown the deprivation of a constitutional right. *Wilson v. Layne*, 526 U.S. 603, 609 (1999). If so, the court then must determine " 'whether the right was clearly established at the time of the alleged violation,' " *id.* (quoting *Conn v. Gabbert*, 526 U.S. 286, 290 (1999)), and whether a reasonable officer could have believed his conduct was lawful. *See Act Up!/Portland v. Bagley*, 988 F.2d 868, 871 (9th Cir. 1993); *Mendoza v. Block*, 27 F.3d 1357, 1360 (9th Cir. 1994). Accordingly, we first examine whether the force used to subdue Deorle was excessive as a matter of law.

I. Excessive Force

[2] We examine the use of force to effect an arrest in light of the Fourth Amendment's prohibition on unreasonable seizures. *Graham v. Connor*, 490 U.S. 386 (1989); *Chew v. Gates*, 27 F.3d 1432, 1440 (1994). The officer's actions are measured by the standard of objective reasonableness, *Graham*, 490 U.S. at 397. The reasonableness of the force used to effect a particular seizure is determined by "careful[ly] balancing . . . 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake." *Graham*, 490 U.S. at 396 (quoting *Tennessee v. Garner*, 471 U.S. 1, 8 (1985)). As we have held, "[t]he force which [i]s applied must be balanced against the need for that force." *Liston v. County of Riverside*, 120 F.3d 965, 976 (1977). *See also Alexander v. City and County of San Francisco*, 29 F.3d 1355, 1367 (9th Cir. 1994).

A. Nature and Quality of Intrusion

We first assess the quantum of force used to arrest Deorle by considering "the type and amount of force inflicted." *Headwaters Forest Def. v. County of Humbolt*, 211 F.3d 1121, 1133 (9th Cir. 2000) (internal quotation marks omitted) (quoting *Chew*, 27 F.3d at 1440). In the

instant case, Rutherford shot Deorle using a lead-filled, "less-lethal" round.[13] This cloth-cased shot, which is something akin to a rubber bullet, is defined as a "long-range impact weapon."[14] It is fired from a 12-gauge shotgun, and calculated to stop "people who are violent or hostile and are threatening injury or death to themselves or others." By Rutherford's own admission, the cloth-cased shot was potentially lethal at thirty feet and could be lethal at distances up to fifty feet. Also by Rutherford's own admission, "[t]he target area for lethal capabilities would probably be the facial area. . . . If it impacted at the heart it could stop the heart or possibly tear a vital artery." Rutherford shot at Deorle's torso from thirty feet: the round hit Deorle in the head and removed his left eye and lodged pieces of lead shot in his skull.

The force used was obviously enough to cause grave physical injury. It knocked Deorle off his feet, and removed one of his eyes. The force applied through use of the cloth-case shot can kill a person if it strikes his head or the left side of his chest at a range of under fifty feet. Such force is much greater than that applied through the use of pepper spray, *see Headwaters Forest*, 211 F.3d at 1138, or a painful compliance hold, *see Forrester v. City of San Diego*, 25 F.3d 804, 806 (9th Cir. 1994)(police force's "pain compliance unit" dispersed demonstrators using "Orcutt Police Nonchakus" – two sticks of wood connected at one end by a cord – or using wrist-and arm-twisting and pressure point holds), and more likely to cause a life-threatening injury than most dog bites. *See Vera Cruz v. City of Escondido*, 139 F.3d 659, 663 (9th Cir. 1997).

[3] However, the cloth-cased shot appears to fall short of deadly force, defined in this circuit, as "that force which is *reasonably likely* to cause death." *Vera Cruz*, at 663 (emphasis added).[15] The shot

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[13] The appellees also call the cloth-cased shot a "beanbag" round. That euphemism grossly underrates the dangerousness of this projectile. The round is not some sort of "hackey-sack." It is a projectile capable of inflicting serious injury or death, rather than some children's toy.

[14] *See* the affidavit of Peter A. Reedy, a Sergeant with the Sacramento Department Force for 20 years, dated March 16, 1999, and filed in support of Deorle's opposition to defendants' motion for summary judgment.

[15] The extremely high deadly-force standard enunciated in *Vera Cruz* is unique to this circuit. *See id.* at 663.

is not like a regular bullet – it does not normally rip through soft tissue and bone on contact with the human body. It is designed to knock down a target, rendering the individual incapable of resistance, without (in the normal course of deployment) resulting in death. Nonetheless, the cloth-cased shot constitutes force which carries a significant risk of serious injury, and, thus, is not to be deployed lightly.[16] To put it in terms of the test we apply: it is to be used only when a strong governmental interest compels the employment of so high a degree of force.

B. Governmental Interests at Stake

[4] We measure the governmental interests at stake by evaluating a range of factors: they include " '(1) the severity of the crime at issue, (2) whether the suspect pose[d] an immediate threat to the safety of the officers or others . . . (3) whether he [was] actively resisting arrest or attempting to evade arrest by flight,' and any other 'exigent circumstances [that] existed at the time of the arrest.' " *Headwaters Forest*, 211 F.3d at 1133 (quoting *Chew*, 27 F.3d at 1440-1441 & n.5). These factors, however, are simply a means by which to determine objectively "the amount of force that is necessary in a particular situation." *Graham*, 490 U.S. at 396-97.

[5] The character of the offense is often an important consideration in determining whether the use of force was justified. *See Chew*, 27 F.3d at 1442 & n.9; *Headwaters Forest*, 211 F.3d at 1138-1139 (same). In this case, the officers were initially on, or attempting to enter, Deorle's property without a warrant. They arrived, not to arrest him, but to investigate his peculiar behavior. Deorle was clearly a deeply troubled, emotionally disturbed individual. Mrs. Deorle testified that pain, induced by a reaction to his medication, had driven Deorle "out of control. He just didn't want to live any more." Deorle repeatedly asked officers to shoot him. Lt. Estes, reported that Deorle shouted he "[ha]d no reason to live . . . that the pain was unbearable, and that he wanted to be done with the pain, and that there was no use

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[16] According to the affidavit of Peter A. Reedy, "[t]he Use of Force Continuum, as used in California, would list an impact weapon high on the schedule of force. . . . It would be unreasonable for an officer to use an impact weapon on an unarmed person."

in continuing." Officer Johnson, Rutherford's superior, heard Deorle asking other officers to kill him. Instead of seeking to counsel Deorle, at some point the officers determined to use force to arrest him. They started by "testing" him with a police dog, and ended by firing the cloth-cased shot in his face. Deorle was eventually charged with obstructing the police in the performance of their duties. *See* Cal. Pen. Code § 69.

[6] The problems posed by, and thus the tactics to be employed against, an emotionally distraught individual who is creating a disturbance or resisting arrest are, and must be, differentiated from those involved in efforts to subdue an armed and dangerous criminal who has recently committed a serious offense. In the former instance, increasing the use of force may, in a number of circumstances, exacerbate the situation; in the latter instance, a heightened use of the less-than-lethal force will ordinarily be helpful in bringing a dangerous situation to a swift end. In the case of mentally unbalanced persons, the use of officers and others trained in the art of counseling is ordinarily advisable, and may provide the best means of ending the crisis. Even when an emotionally disturbed individual is "acting out" and inviting officers to use deadly force to subdue him, the governmental interest in using such force is diminished by the fact that the officers are confronted, not with a criminal, but with a mentally ill person.

[7] We acknowledge that police officers' decisions about the appropriate amount of force to use in a given circumstance "are often . . . split-second judgments [made] in circumstances that are tense, uncertain, and rapidly evolving." *Graham*, 490 U.S. at 396-97; *see also Washington v. Lambert*, 98 F.3d 1181, 1186 (9th Cir. 1996). However, the situation here was far from that of a lone police officer suddenly confronted by a dangerous armed felon threatening immediate violence. Rutherford was at the scene for over half an hour before he shot the emotionally disturbed Deorle. He had an opportunity to consult with his superiors before approaching the reconnoiter. *Compare Chew*, 27 F.3d at 1142. During that time, Deorle did not attempt to evade arrest by flight: he stayed on or adjacent to his own property. He did not pose an immediate safety threat: he responded to the officers' instructions and did not attack anyone. He threw down his potential weapons when ordered to do so.

[8] Rutherford observed Deorle at close proximity for about five to ten minutes before shooting. His testimony is that he fired his shotgun as Deorle was walking towards him, at a steady gait, and without any weapons.[17] Rutherford decided that he would shoot when Deorle came within a certain range, steadied himself against a tree, and waited until Deorle reached that point; then, without a command to stop or a warning that force would be employed, he pulled the trigger. Rutherford did not make a split-second choice. *See Headwaters Forest*, 211 F.3d at 1138 (a reasonable fact finder could conclude that the decision to use non-lethal force was not made in the heat of the moment).[18] Rather, he evinced unhurried deliberation in shooting Deorle.

[9] Of course, Deorle might never have passed the predetermined spot had Rutherford given him the warning to which he was entitled or a command to halt. An officer must give a warning, when feasible, before shooting a suspect. *See Garner*, 471 U.S. at 11-12; *Jensen v. City of Oxnard*, 145 F.3d 1078, 1086 (9th Cir. 1998). Officers provide warnings, where possible, even when the force used is less than deadly. *See Brewer v. City of Napa*, 210 F.3d 1093, 1094-1095 (9th Cir. 2000)(police officer gave warning before setting dog on suspect); *Vera Cruz*, 139 F.3d at 660 (same); *Headwaters Forest*, 211 F.3d at 1129 (police warned protesters before use of pepper spray); *Katz*, 194 F.3d 970 (violently grabbing protester without warning and throwing him into police van was fourth amendment violation). Here, there was ample time to give a warning but no warning was given. Rutherford does not remember giving a warning; nor do any of the other eleven witnesses mention his doing so when describing the events

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[17] Deorle was wearing no shirt or shoes, only a pair of cut-off jeans shorts. There was nowhere for him to secrete any weapons.

[18] Nothing in the record before us suggests Rutherford considered other, less dangerous, methods of stopping Deorle. *See Headwaters Forest*, 211 F.3d at 1139 (holding that, where use of force is potentially lethal, police "were required to consider '[w]hat other tactics if any were available' to effect their arrest"); *Chew*, 27 F.3d at 1443 (same). In fact, other officers used a police dog to provoke him: a "police tactic that needlessly or unreasonably creates a dangerous situation necessitating an escalation in the use of force," and a course of action this circuit has expressly refused to endorse. *See Cunningham v. Gates*, 229 F.3d 1271, 1291 n.23 (9th Cir. 2000).

they saw or heard.[19] At most, Rutherford may have shouted "less lethal."[20] That cryptic statement was insufficient to alert a target to the force about to be deployed, and does not satisfy the pre-use of force warning requirement.

C. Weighing the Conflicting Interests

[10] Viewing the facts presented by the record in the light we must, even though Rutherford used force that is properly classified as less than deadly, the force used was excessive compared to the governmental interests at stake. Deorle was obviously a deeply emotionally disturbed person. He had suffered such a severe reaction to his prescription medication that he begged various officers to shoot him to end the pain. Despite his distraught condition, however, he did not attack anyone. Instead, Officer Rutherford fired the cloth-cased round at him and left him with the lead shot impacted in his skull and the cloth-cased round sticking "half out of his eye." Under the fourth-amendment objective-reasonableness standard, the shooting violated Deorle's right to be free from unreasonable seizures. *See Garner*, 471 U.S. at 7.[21] We now consider whether Rutherford is protected by the

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[19] At oral argument, appellee's counsel claimed that it was Rutherford's usual practice to give a warning before shooting. While that testimony would not have changed our analysis, there is no evidence in the record before us that supports counsel's claim, and certainly no foundational evidence, such as how many times Rutherford had shot people in the past.

[20] Officer Estes claims to have heard Rutherford shout "less-lethal" before firing. Officer Smith claims Rutherford shouted "less-lethal," but cannot remember whether it was before or after the shot was fired. It is just as likely that both officers heard Lt. Nichols, who admitted that he shouted "less than lethal" after Rutherford fired the cloth-cased shot "so other officers would know what had occurred." Estes and Smith are the only witnesses who remember hearing Rutherford shout such an utterance. None of Nathaniel and Jennifer Risley, Rhonda Deorle, or Mr. Stonebraker mention any warning, although they heard a shot. Officers Muldown, Collins and Nichols heard a shot but no warning, and Rutherford's affidavit does not mention any shouting of a warning before firing.

[21] The dissent is simply wrong when it insists that the undisputed fact is that the force used against Deorle was not reasonable likely to cause serious injury. There is, at the very least, a genuine issue of material fact in the record as to that question. In any event, the question is not of substantial significance here. The "reasonably likely to cause serious injury" inquiry is a part of the deadly-force determination in all other

defense of qualified immunity.

II. Qualified Immunity

[11] The individual defendants, to the extent they have been sued in their individual capacities for violating § 1983, have raised the affirmative defense of qualified immunity. The doctrine of qualified immunity insulates government agents against personal liability for money damages for actions taken in good faith pursuant to their discretionary authority. *See Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982). However, "governmental officials . . . generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." 457 U.S. at 818.

[12] In excessive-force cases, this circuit measures qualified immunity by the same standard it measures the excessive force at issue. In other words, the qualified immunity test is the same as the test on the merits. *See Scott v. Henrich*, 39 F.3d 912, 914 (9th Cir. 1994); *Headwaters Forest*, 211 F.3d at 1141; *Alexander*, 29 F.3d at 1367; *Chew*, 27 F.3d at 1449 n.19. Accordingly, in line with established Ninth Circuit precedent, it is clear that because, on the facts presented, viewed in the light most favorable to the plaintiff, the force used was unreasonable, Rutherford is not entitled to qualified immunity.[22]

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circuits that have defined "deadly force." We have, wisely or not, rejected the test all others employ. *See* n.13, *supra*. In the case before us, however, the question is not whether the force was "deadly." Regardless of how we classify particular types of force, the evidence in the record before us makes it clear that the force used by Rutherford is quite capable of causing serious injury to the person shot. Accordingly, "deadly" or not, such force may not be used except when a strong governmental interest warrants its use, and then, only following a warning, if feasible. We should also note that to examine the possibility of serious injury, as does the dissent, on the basis of the assumption that a shot from a shotgun will hit the precise part of the body at which it is aimed by the shooter, is not only unsupported by the record, but contrary to the experience and training of law enforcement agencies.

[22] We note that in at least one instance we have found the use of force unreasonable but have granted qualified immunity. In *Hammer v. Gross*, 932 F.2d 842, 850 (1991)(en banc) we found that under the Supreme Court cases that controlled at the time of the forcible taking of the defendant's blood over his vigorous objections, the seizure was not unlawful, but that an intervening Supreme Court decision had changed

We note, however, that the Supreme Court has recently granted certiorari in *Katz v. United States*, 194 F.3d 962, 967 (9th Cir. 1999), *cert. denied*, ___U.S.___, 121 S.Ct. 480 (2000). *Katz* collects the cases that demonstrates that the overwhelming majority of circuits that have addressed the issue of qualified immunity for unreasonable uses of force follow the same rule as the Ninth Circuit, with the Fifth Circuit being the sole exception. The Fifth Circuit's rule is set forth in *Snyder v. Trepagnier*, 142 F.3d 791 (5th Cir. 1998), in which a jury found that the police officer's use of force was excessive, but then granted him qualified immunity. *Id.* at 800. The Fifth Circuit upheld the jury verdict, applying a separate qualified-immunity test that first determines whether the officer's use of force violated clearly established law, then inquires whether, on the facts as they appeared to the officer, he reasonably could have believed that he was not violating that law, or, as the Fifth Circuit put it, whether the circumstances indicate that "the officer . . . ma[de] a constitutionally reasonable judgment based on a factual misperception." *Id.* (internal quotations omitted) (quoting *Melear v. Spears*, 862 F.2d 1177, 1188 (5th Cir. 1989) (Higginbotham, J., concurring). Thus, the Fifth Circuit applies a traditional qualified immunity test to excessive force cases. In the case before us, we reach the identical result applying the traditional qualified immunity test as we do applying the "same as the merits" rule that we, and most of the other circuits, follow.

[13] In applying the first part of the traditional qualified-immunity test — whether the law was clearly established — we start with the general proposition that the use of force that is objectively unreasonable is unlawful and that it is not necessary that a court have determined previously that the precise use of the particular force under similar circumstances is excessive. *See Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (requiring only that "the contours of the right . . . be sufficiently clear that a reasonable official would understand that what he is doing violated that right"). As we said in *Mendoza v. Block*:

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the law. Thus, one exception to our general rule is where, after the date of the incident, there has been a change in the law that renders previously permissible force impermissible. In such circumstances, the officer *is* entitled to qualified immunity. Such is not the case here, however. The law has never held the type of conduct displayed here to be constitutional.

> We do not believe that a more particularized expression of the law is necessary for law enforcement officials . . . to understand that under some circumstances the use of such a "weapon" might become unlawful. For example, no particularized case law is necessary for a deputy to know that excessive force has been used when a deputy sics a canine on a handcuffed arrestee who has fully surrendered and is completely under control. An officer is not entitled to qualified immunity on the grounds that the law is not clearly established every time a novel method is used to inflict injury.

27 F.3d at 1362 (citing *Anderson*, 483 U.S. at 640). It is therefore irrelevant "whether [the use of force] involves physical restraint, use of a baton, use of a gun, or use of a dog." *Id.* (citing *Anderson*, 483 U.S. at 640). When it should be apparent to any reasonable officer that the force he uses is excessive, there is no justification for granting qualified immunity. Deorle was distraught, disoriented, and emotionally disturbed. Rutherford shot him using a round composed of lead shot enclosed by a cloth casing and fired at speeds of up to three-hundreds feet per second from a twelve-gauge shotgun. The force, designed to render a person incapable of resistance, was listed higher on the California police's "escalation of force" chart than other types of force short of deadly force that have sometimes been held to be excessive in this circuit. *See, e.g., Chew*, 27 F.3d at 1443. Although there is no prior case prohibiting the use of this specific type of force in precisely this type of situation, that is insufficient to entitle Rutherford to qualified immunity.

[14] In addition, it has been long settled that an officer has a duty to warn, where feasible, before using significant force capable of causing serious injury upon an unarmed suspect. *See Garner*, 471 U.S. at 11-12; *Quintanilla v. City of Downey*, 84 F.3d 353, 357 (9th Cir. 1996). This is so whether the force is classified as deadly or less than deadly. *See Quintanilla*, 84 F.3d 354 (police officer gave warning before setting dog on suspect); *Mendoza*, 27 F.3d 1362 (proper, for purposes of qualified immunity inquiry, for court to determine whether officer had given warning before setting dog on suspect); *Forrester v. City of San Diego*, 25 F.3d 804, 806 (9th Cir. 1994) (before each arrest, protesters warned that they would be subject to pain compliance

measures if they did not move). *See also Headwaters Forest*, 211 F.3d at 1129 (police warned protesters before use of pepper spray).; *Katz*, 194 F.3d at 970 (violently grabbing protester without warning and throwing him into police van was forth amendment violation). Where a firearm is used by members of law enforcement, the phrase "Halt or I'll shoot!" has long been a part of our national culture, and it is familiar to most youngsters whether they grow up reading books, watching television, or both. The commonly acknowledged and well-known practice of warning suspects, whenever feasible, before subjecting them to force that may cause serious injury demonstrates that "the defendant['s] conduct [wa]s so patently violative of the constitutional right that reasonable officials would know without guidance from the courts that the action was unconstitutional, [and] closely analogous pre-existing case law is not required to show that the law is clearly established." *DeBoer v. Pennington*, 206 F.3d 857, 864-865 (9th Cir. 2000).[23] By shooting Deorle with the cloth-cased shot without giving him a warning, Rutherford failed to act in accordance with clearly established law.

[15] Furthermore, under the second part of the Fifth Circuit's qualified-immunity standard, Rutherford could not have reasonably believed that his actions would not violate Deorle's constitutional rights. The facts in this case are stark: as these facts appeared to Rutherford, he could not have made a reasonable judgment that the force he used was constitutional. Deorle was an emotionally disturbed individual; disoriented, "out of control," and possibly intent upon suicide. At the time Rutherford shot him, Deorle was unarmed and walking towards Rutherford at a normal gait. Despite Deorle's confused state, Rutherford determined that he would shoot at such time as Deorle reached a point thirty feet away. Without giving a warning, or even demanding that he stop his approach, Rutherford waited until Deorle came within the pre-established range, then fired. No officer could

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[23] These cases establish that, where possible, the warning must immediately precede the use of force, *see Harris v. Roderick*, 126 F.3d 1189, 1201 (9th Cir. 1997) (holding that it was clearly established in 1992 that a policy mandating use of deadly force without an appropriate warning was an unconstitutional use of force), and the warning must not merely demand compliance with instructions, but advertise that the use of force will follow any failure to comply. *See Chew*, 27 F.3d at 1443 n.10 (citing *Reed v. Hoy*, 909 F.2d 324, 330 (9th Cir. 1989)). Here, on the record before us, there was ample time to give a warning, but no warning was given.

reasonably have believed that under these facts the shooting constituted reasonable force.[24] Accordingly, applying either the Ninth Circuit's standard or the Fifth Circuit's traditional qualified-immunity standard, and viewing the facts in the light most favorable to the plaintiff, Rutherford was not entitled to qualified immunity for his use of excessive force.

CONCLUSION

Viewing the facts in the light we must, we conclude that, for purposes of summary judgment, Rutherford's use of force was excessive and the defense of qualified immunity is unavailing. At a distance of thirty feet, Rutherford shot at a man who would have been better placed in a hospital than in custody. The degree of force was clearly in excess of the governmental interest at stake, and was used in circumstances that did not justify the failure to warn. There was no basis for any factual misperception and no reasonable officer could have concluded that the force employed was constitutional. Accordingly, we reverse the grant of summary judgment and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

SILVERMAN, Circuit Judge, dissenting:

The essential facts are not disputed. Plaintiff Richard Deorle was deranged and out of control when Deorle's wife made the 911 cal to the police. When Deorle saw his wife on the telephone calling for help, he told her that they would have to come kill him.

After the first deputy sheriff (Mahon) arrived at the scene, Deorle was observed holding a two-by-six board with nails protruding from the end of it. According to Mrs. Deorle's taped-recorded statement on the day in question, Deorle "was so angry, that he just started lifting up the porch, you know the board, it has a railing and he lifted up the railing and he was like swinging it" like a baseball bat. At her

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[24] Nor, as noted earlier, was the state of the law different at the time summary judgment was granted than at the time the incident occurred. *See* n.20, *supra*.

deposition held three years later, Mrs. Deorle stated that he was "screaming" but not swinging the board around. Either way, the undisputed fact is that Deorle, while screaming and out of control, was in possession of a board with protruding nails, and that he finally dropped it when Mahon took his pistol out of his holster.

Mahon was able to get Deorle's wife and children safely into his police car. Mrs. Deorle told Mahon that Deorle was depressed, that he had been drinking, that he was in a rage caused by his medication, that he previously had been arrested for assaulting her in a domestic incident, and that he had been on probation.

It is undisputed that after dropping the board, Deorle picked up two hatchets and a crossbow. According to Mrs. Deorle, the crossbow was of the type used for recreational target shooting, not hunting, and that "it does look serious." In her tape-recorded interview, she recalled that when the police on the scene asked her whether her husband had any weapons, she told them, "No, except he has a crossbow."[1]

Lt. Estes heard Deorle say that he wanted to die and that he would kill anyone who came on his property. It was around this time that Deputy Rutherford arrived at the scene and was briefed on all of the above. Deorle dropped the hatchets, but continued to hold the crossbow in his right hand. In his left hand he was carrying a can of lighter fluid. He dropped the crossbow, advanced toward Rutherford and then said something to the effect of, "I'm going to kick your ass, mother-fucker."

It is undisputed that Rutherford was trained in the proper use of the so-called beanbag round, which is designed to knockdown and incapacitate a person so that an arrest can be effected. The majority is right; it is not a toy, but it is not designed to kill or injure. To the contrary, it is designed to prevent serious injury. Although virtually

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[1] It is unclear whether the crossbow was loaded. However, two days after the incident, when asked in a recorded interview about whether the crossbow was loaded, Deorle replied, "Yeah, but shit, it wouldn't even put a hole in that wall right here." He also stated that the crossbow fired a "little arrow" that "basically" had a standard point like on a normal arrow. There is nothing in the record to suggest that the crossbow was a child's toy or looked like one.

anything can cause death or serious injury under the right circumstances and the beanbag round is no exception, *see Vera Cruz v. City of Escondido*, 139 F.3d 659 (9th Cir. 1998), the undisputed evidence established that the firing of a beanbag round from a 12-gauge shotgun at a person's "center mass" from a distance of 20 to 40 feet is not reasonably likely to cause death or serious injury.

I view these undisputed facts the way the district judge did. Deorle may have been sick, he may have been deranged, but that did not make him any less dangerous to the officers who responded to Mrs. Deorle's call for help. Deorle advanced toward Rutherford, threatening to harm him, while carrying a quart can of lighter fluid. Rutherford had no duty to wait to be doused with a flammable liquid or to be set ablaze before acting to protect himself. Rutherford may not have had the right to use deadly force at that point, but he had every right to protect himself with a degree of force likely only to temporarily incapacitate. That is what he did. The evidence is uncontradicted that the beanbag round was fired at Deorle's lower right abdomen but that it suddenly "flew up" and unexpectedly and unintendedly hit Deorle in the face.

A key ingredient of the majority's qualified immunity analysis is its view that an officer has a duty to warn, if possible, before deploying any force, even a degree of force that is not reasonably likely to cause death or serious injury. The problem is that none of the cases cited by the majority has so held.[2] Maybe the law ought to require a police officer to give a warning before such force is used. However, the issue at the moment is whether such a requirement was clearly established on September 9, 1996, the date on which Rutherford was called to the Deorle home. It was not.

Where does this leave us? The undisputed facts show that Rutherford, without warning, used a degree of force that was not reasonably likely to cause death or serious injury, against a deranged man whose behavior prompted his wife to call 911, who police saw in possession of a board with protruding nails, then two hatchets, then a

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[2] *Brewer v. City of Napa*, 210 F.3d 1093 (9th Cir. 1998); *Vera Cruz v. City of Escondido*, 139 F.3d 659 (9th Cir. 1998); *Headwaters Forest Def. v. County of Humbolt*, 211 F.3d 1121 (9th Cir. 2000) *superceded by* 2000 WL 33141957 (2000); *Katz v. United States*, 194 F.3d 962 (9th Cir. 1999), *cert. granted*, 1212 S.Ct. 480 (2000).

crossbow, and who was *then* advancing toward Rutherford with a can of flammable liquid while declaring his intention to do Rutherford harm. I agree with the district judge. Rutherford is entitled to qualified immunity because a reasonable officer could have believed that his conduct was lawful. *Act Up!/Portland v. Bagley*, 988 F.2d 868 (9th Cir. 1993). I would affirm the granting of summary judgment in favor of Rutherford and the Sheriff of Butte County.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

Richard Leo Deorle,

Plaintiff,

v.

Greg Rutherford, Butte County Deputy Sheriff; Mick Grey, Butte County Sheriff; County of Butte,

Defendants.

/

NO. CIV. S-97-434-LKK/PAN

ORDER

FILED
MAY 4 1999
CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

On April 8, 1999, the undersigned granted summary judgment in favor of the following defendants in the above-captioned matter: the County of Butte, Sheriff Mick Grey and Officer Greg Rutherford. Plaintiff has filed a motion for reconsideration of that order.[1]

Local Rule 78-230(k) states that a motion for reconsideration should include "what new or different facts or circumstances are claimed to exist which did not exist or were not shown upon such prior motion, or what other grounds exist for the motion." Plaintiff bases his motion for reconsideration on the contention that, instead of deploying beanbag rounds, Officer Rutherford could have engaged plaintiff in hand-to-hand combat. Plaintiff made this very argument in his opposition to defendants' motion for summary judgment.

Accordingly, plaintiff has failed to meet the standards established by Local Rule 78-230(k), and his motion for reconsideration

[1] On April 12, 1999, after the court had already heard oral argument on defendants' motion for summary judgment, plaintiff filed an application for leave to amend his opposition to defendants' motion for summary judgment. Then, on April 16, 1999, plaintiff filed a motion for reconsideration of the court's order granting summary judgment in defendants' favor. The two documents present the same argument, and therefore the court considers them together.

is hereby DENIED.

IT IS SO ORDERED.

DATED: May 3, 1999.

/S/ LAWRENCE K. KARLTON
LAWRENCE K. KARLTON
CHIEF JUDGE EMERITUS
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

Richard Leo Deorle,

Plaintiff,

v.

Greg Rutherford, Butte County Deputy Sheriff; Mick Grey, Butte County Sheriff; County of Butte,

Defendants.

/

NO. CIV. S-97-434-LKK/PAN

ORDER

FILED
APRIL 13, 1999
CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

Before the court is a motion for summary judgment filed by the County of Butte, Sheriff Mick Grey and Officer Greg Rutherford. The court resolves the motion on the pleadings and papers filed herein and after oral argument.

I.

FACTS[1]

At approximately 4:00 p.m. on September 9, 1996, Ronda Deorle, the wife of plaintiff Richard Deorle, called 9-1-1 from her home. She reported that her husband had been screaming and hitting the walls. Deorle concedes that he was in a volatile, agitated state and that he had lost control of himself.

The Butte County Sheriff's Department dispatched Deputy George Mahon to the Deorle home, which was located in a residential neighborhood. Once he arrived, Mrs. Deorle and the children left the house. Shortly thereafter, Deorle came outside carrying a large two-by-six board with protruding nails. Deorle proceeded to the driveway near

[1] The facts as stated herein are undisputed unless otherwise noted.

Deputy Mahon. Eventually, he dropped the board. Deputy Mahon then turned around to interview Mrs. Deorle. She informed Deputy Mahon that her husband had been arrested for assaulting her a few years earlier and that recently he had been feeling depressed. When Deputy Mahon turned to face Deorle again, he noticed that Deorle held a roofing hatchet in each of his hands.

Eventually, a handful of police officers from various jurisdictions arrived at the scene. Sheriff's deputies used patrol vehicles to block the intersections near Deorle's residence. Deorle then began walking up and down the road in front of his home with a roofing hatchet and a loaded crossbow pistol.[2] Officers on the scene contacted a Special Incident Response Team (SIRT) which included defendant Deputy Greg Rutherford.

Upon arriving at the scene, Deputy Rutherford learned that Deorle had threatened officers with various weapons and that he was under the influence of alcohol. Under the circumstances, Rutherford determined that the use of less-lethal force would be appropriate. Rutherford advised officers on the scene that he had been trained in the use of less-lethal force and that he was authorized to use such force. Rutherford loaded his shotgun with less-lethal beanbag rounds and approached the area where Deorle was wandering. Another officer accompanied Rutherford as backup.

Once Deorle saw Deputy Rutherford, he began to taunt and threaten him. Rutherford noticed that Deorle had a crossbow in his right hand and a can of lighter fluid in his left hand and became concerned that Deorle might harm someone. Accordingly, Rutherford made the decision to deploy the less-lethal beanbag rounds if Deorle came within thirty feet of him, which in accordance with his training he determined was the appropriate distance for firing the beanbag rounds.

Rutherford ordered Deorle to drop his weapons. Deorle threw down his crossbow and then approached Rutherford in a threatening manner. As he advanced toward Rutherford, Deorle threatened to attack him. When Rutherford believed that Deorle was thirty feet away

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[2] Plaintiff contends that the crossbow was a toy, not a real weapon.

from him, he deployed the less-lethal round with the intent of knocking Deorle down and then arresting him.

Deputy Rutherford contends that he aimed the round at Deorle's right lower rib area. Deorle contends that Rutherford aimed at his chest. Wherever Rutherford aimed, the parties agree that, once deployed, the beanbag unexpectedly veered up and to Rutherford's right, striking Deorle in the left eye and ultimately causing the loss of that eye.

Deorle sues the manufacturer of the beanbag rounds for negligence and strict products liability. Deorle also sues the County of Butte, Deputy Rutherford and Butte County Sheriff Mick Grey for allegedly violating his fourth amendment right to be free from excessive force. Both sets of defendants have moved for summary judgment. This order addresses the motion filed by the County defendants.

II.

STANDARDS

Summary judgment is appropriate when it is demonstrated that there exists no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); See also Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970); Owen v. Local No. 169, 971 F.2d 347, 355 (9th Cir. 1992).

Under summary judgment practice, the moving party

> [A]lways bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.

Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). "[W]here the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the 'pleadings, depositions, answers to interrogatories, and

admissions on file.'" Id. Indeed, summary judgment should be entered, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. Id. at 322. "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Id. In such a circumstance, summary judgment should be granted, "so long as whatever is before the district court demonstrates that the standard for entry of summary judgment, as set forth in Rule 56(c), is satisfied." Id. at 323.

If the moving party meets its initial responsibility, the burden then shifts to the opposing party to establish that a genuine issue as to any material fact actually does exist. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986); see also First Nat'l Bank of Ariz. v. Cities Serv. Co., 391 U.S. 253, 288-89 (1968); Ruffin v. County of Los Angeles, 607 F.2d 1276, 1280 (9th Cir. 1979), cert. denied, 455 U.S. 951 (1980).

In attempting to establish the existence of this factual dispute, the opposing party may not rely upon the denials of its pleadings, but is required to tender evidence of specific facts in the form of affidavits, and/or admissible discovery material, in support of its contention that the dispute exists. Rule 56(e); Matsushita, 475 U.S. at 586 n.11; See also First Nat'l Bank, 391 U.S. at 289; Strong v. France, 474 F.2d 747, 749 (9th Cir. 1973). The opposing party must demonstrate that the fact in contention is material, i.e., a fact that might affect the outcome of the suit under governing law, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987), and that the dispute is genuine, i.e., the evidence is such that a reasonable jury could return a verdict for the nonmoving party, Anderson, 477 U.S. 248-49; See also Wool v. Tandem Computers, Inc., 818 F.2d 1433, 1436 (9th Cir. 1987).

In the endeavor to establish the existence of a factual dispute, the opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient that "the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." First Nat'l Bank, 391 U.S. at 290; See also

T.W. Elec. Serv., 809 F.2d at 631. Thus, the "purpose of summary judgment is to 'pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial.' " Matsushita, 475 U.S. at 587 (quoting Fed. R. Civ. P 56(e) advisory committee's note on 1963 amendments); See also International Union of Bricklayers & Allied Craftsman Local Union No. 20 v. Martin Jaska, Inc., 752 F.2d 1401, 1405 (9th Cir. 1985).

In resolving the summary judgment motion, the court examines the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any. Rule 56(c); See also SEC v. Seaboard Corp., 677 F.2d 1301, 1305-06 (9th Cir. 1982). The evidence of the opposing party is to be believed, Anderson, 477 U.S. at 255, and all reasonable inferences that may be drawn from the facts placed before the court must be drawn in favor of the opposing party, Matsushita, 475 U.S. at 587 (citing United States v. Diebold, Inc., 369 U.S. 654, 655 (1962) (per curiam)); See also Abramson v. University of Hawaii, 594 F.2d 202, 208 (9th Cir. 1979). Nevertheless, inferences are not drawn out of the air, and it is the opposing party's obligation to produce a factual predicate from which the inference may be drawn. See Richards v. Nielsen Freight Lines, 602 F. Supp. 1224, 1244-45 (E.D. Cal. 1985), aff'd 810 F.2d 898, 902 (9th Cir, 1987).

Finally, to demonstrate a genuine issue, the opposing party "must do more than simply show that there is some metaphysical doubt as to the material facts. . . . Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.' " Matsushita, 475 U.S. at 587 (citation omitted).

III.

ANALYSIS

The County defendants contend that they are entitled to summary judgment on the following grounds: (1) Deputy Rutherford is entitled to qualified immunity; (2) the County and Sheriff Grey did not act pursuant to any county policy or practice or with deliberate indifference to Deorle's constitutional rights; and (3) Sheriff Grey acted on behalf of the State, not the County, and therefore his conduct cannot

form the basis of any liability attributed to the County. I turn first to Deputy Rutherford's qualified immunity argument.[3]

Deorle alleges that Deputy Rutherford violated his constitutional right to be free from excessive force. When analyzing excessive force claims, courts rely upon the Fourth Amendment and its "reasonableness" standard, Graham v. Connor, 490 U.S. 386, 395 (1989), and courts in the Ninth Circuit treat the qualified immunity inquiry and the inquiry on the merits as one and the same. Hopkins v. Andaya, 958 F.2d 881, 885 n.3 (9th Cir. 1992).

Deputy Rutherford contends that his decision to deploy the beanbag round was objectively reasonable under the circumstances. "Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force." Tennessee v. Garner, 471 U.S. 1, 11 (1985). "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments-in circumstances that are tense, uncertain, and rapidly evolving-about the amount of force that is necessary in a particular situation." Id. at 396-97.

The First Circuit Court of Appeals has explained that Garner "surround[s] the police who make these on-the-spot choices in dangerous situations with a fairly wide zone of protection in close cases." Roy v. City of Lewiston, 42 F.3d 691, 695 (1st Cir. 1994). Thus, resolution in favor of the officer, as a matter of law, of an excessive force claim is proper where "a jury could not find that his conduct was so deficient that no reasonable officer could have made the same choice . . . in circumstances that were assuredly 'tense, uncertain, and rapidly evolving . . .' " Id. (quoting Graham, 490 U.S. at 397). Garner and its progeny are dispositive here.

At various times, Deorle wielded a board with protruding nails, roofing hatchets, a cross-bow and a can of lighter fluid. He threatened

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[3] Where the underlying facts in a case are undisputed, a court must determine the availability of qualified immunity on an officer's motion for summary judgment. Act Up!/Portland v. Bagley, 988 F.2d 868, 873 (9th Cir. 1992).

officers, wandered up and down the street and resisted their attempts to detain him peacefully. By his own admission, Deorle had lost control. In his ultimate act of defiance that day, Deorle charged toward Rutherford and threatened to attack him. Deorle's conduct put Rutherford on the defensive and forced him to act quickly to protect himself. The Supreme Court designed its "calculus of reasonableness" to protect officers who find themselves in such volatile, tense circumstances as those confronting Deputy Rutherford.

Deorle tries to neutralize any perception that he threatened Deputy Rutherford's safety by emphasizing that, at the time Rutherford deployed the beanbag rounds, Deorle had not objects in his hands other than a can of lighter fluid, had no shoes on his feet and stood thirty feet away from Rutherford who had ample backup from other officers on the scene. I cannot concur with plaintiff's view. The factors plaintiff relies on did not make Deorle any less of a threat to Rutherford's safety. Given Deorle's apparent state of mind that afternoon, the absence of shoes on his feet or a weapon in his hand would not have prevented him from attacking Rutherford. Furthermore, the surrounding officers on the scene could do nothing to prevent Deorle's attack outside of deploying less-lethal or lethal ammunition themselves. Deputy Rutherford's only choice aside from deploying the beanbag rounds was to engage Deorle in hand-to-hand combat. The law does not compel such a choice under the circumstances.

The court recognizes that '[be]cause questions of reasonableness are not well-suited to precise legal determination, the propriety of a particular use of force is generally an issue for the jury." Chew v. Gates, 27 F.3d 1432, 1440 (9th Cir. 1994). Nonetheless, in this case, a reasonable jury could not find that no reasonable officer would have made the same decision under the circumstances that confronted Deputy Rutherford. Accordingly, Deputy Rutherford is entitled to qualified immunity against Deorle's excessive force claim.

Because the court concludes, as a matter of law, that Rutherford did not violate Deorle's right to be free from excessive force, there is no basis for holding the County and Sheriff Grey liable either.

IV.

ORDER

For all the foregoing reasons, the court hereby GRANTS the motion for summary judgment filed by the County, Sheriff Grey and Deputy Rutherford.

IT IS SO ORDERED.

DATED: April 8, 1999.

/S/ LAWRENCE K. KARLTON
LAWRENCE K. KARLTON
CHIEF JUDGE EMERITUS
UNITED STATES DISTRICT COURT

MAY 15 2002

No. 01-1245

In The Supreme Court of the United States

GREG RUTHERFORD, Butte County Sheriff's Deputy, MICK GREY, Butte County Sheriff, and COUNTY OF BUTTE,

Petitioners,

vs.

RICHARD LEO DEORLE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS RESTATED

1) Whether a peace officer, while confronting an unarmed mentally disturbed man who is wearing nothing but shorts and who has been partially compliant with police commands, is acting objectively reasonable when the officer shoots the man at a distance of over 30 feet with a shotgun propelled cloth bag loaded with buckshot where the man has not committed a serious crime and does not present a flight risk.

2) Whether a peace officer who unnecessarily shoots an unarmed man who is more than 30 feet away in order to take the man into custody for a minor crime is entitled to qualified immunity.

3) Whether prior to using force likely to produce great bodily injury or death, a peace officer should provide a warning.

4) Each time a police force acquires a new weapon or device, is it entitled to use such weapon or device without regard to existing law until a case is decided for that specific weapon or device.

5) May a police officer who claims to be confused by the state of existing law find a safe harbor from liability by claiming a "reasonable mistake as to the legality of his actions" where his actions caused great bodily injury to an unarmed man.

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STATEMENT OF THE CASE

A. Facts Giving Rise To This Case

On September 9, 1996, Plaintiff Richard Leo Deorle, a resident of Paradise, Butte County, California, became highly agitated and emotionally unstable due to a drug reaction to Interferon used to treat Hepatitis C, a prescribed medication. (ER-103). Because of his instability exhibited by hostile words and aggression against the physical interior of his residence, his wife called 911. Upon the arrival of an officer at the residence, Richard Deorle's wife and children left the residence in the custody of a police officer. (ER-103). During the removal of Mr. Deorle's wife and two children from the residence, Richard Deorle had picked up a board which came off of a porch railing but when told to put the board down by the officer, Mr. Deorle complied. (ER-40; ER-124). Due to the highly agitated state of Mr. Deorle, the responding officer called for backup. At that point in time, through various channels in the police organization, a Special Incident Response Team (SIRT) was called up to handle the incident. (ER-40; ER-168).

Mrs. Deorle testified, at that point in time, she did not feel in any danger personally nor did she believe any danger existed to her children. (ER-119). She, however, felt it prudent to call the 911 emergency number to get help for her agitated husband. (ER-119).

Prior to the incident, Defendant Greg Rutherford, a deputy with the Butte County Sheriff's Department, had received training in the use and deployment of a steel shot filled cloth bag shotgun propelled ammunition manufactured by Defense Technology Inc. During his pre-incident training, Defendant Rutherford observed that the Defense

Technology Inc.'s rounds, when fired at a target, would miss the target entirely on occasion because they would fly or veer off target. (ER-105; ER-159). Prior to the incident, Defendant Rutherford had never deployed the shot filled bag round in the field but had only deployed it in training.

Upon arrival at the scene, Defendant Greg Rutherford loaded his "less lethal" round of ammunition into his 12-gauge shotgun. (ER-140). Defendant Rutherford received no instructions from a scene commander about standards for deployment of the "less lethal" round. No one at the scene or elsewhere made a proposal or communicated to Defendant Rutherford any tactics or plans that were going to be implemented to deal with the Plaintiff Deorle. (ER-143). Defendant Rutherford did not know whether any negotiators were on scene when he arrived, nor did he know whether any of the negotiators had been called to the scene. (ER-144). Negotiators were, in fact, present at the scene, however, were not employed to facilitate a peaceful resolution to the incident. (ER-40; ER-179).

Defendant Rutherford acknowledged that a "less lethal" round shot to the face of a subject constituted deadly force. (ER-158). Defendant Rutherford admitted that the condition of the Plaintiff at the time of the shooting of the "less lethal" round at Plaintiff did not justify the use of deadly force. (ER-138). Several officers at the scene described the Plaintiff as walking toward Defendant Rutherford at the time he was shot. Defendant Rutherford himself described Plaintiff as "walking towards me." (ER-148). All of the parties agree that Defendant Rutherford discharged his 12-gauge shotgun directly at the Plaintiff at a distance of 30 feet or more. (ER-103). It is also undisputed that the "less lethal" missile fired from the shotgun struck the Plaintiff in the left eye embedding

itself in the orbit of the eye resulting in a complete destruction of the eye as well as fractures of the orbit and the spilling of buckshot, which is contained within the bag itself, into the eye and sinus cavities where they remain to this day. (ER-52).

At the time of the shooting of the Plaintiff by Defendant Rutherford, the Plaintiff had in his hand a can of charcoal lighter fluid. Defendant Rutherford did not consider the lighter fluid to be a deadly weapon. (ER-151). No evidence exists that Deorle had any means of lighting the fluid or whether there was fluid in the can. Most significantly, due to the absence of communication between officers at the scene and Defendant Rutherford, who arrived late, Rutherford was unaware of the nature of the board and roofing hammer events. Rutherford saw only the cross-bow, and the only action Deorle conducted with it was to discard it. Rutherford admitted that he did not see Plaintiff assault anyone. (ER-156).

Rutherford did not testify that his conduct was defensive or forced him to act quickly to protect himself. In fact, Rutherford stated he shot Deorle because Deorle had passed a point at which Rutherford decided to fire. (ER-103). At the time that Rutherford fired the projectile at Deorle, Rutherford was standing next to a tree, using it as a prop, and had two armed police officers on each of his flanks. (ER-148; ER-41).

At the time of the shooting, the Defendant Rutherford was not in communication with any person concerning the status of the incident or the protocol that was to be administered. Butte County Sheriff's Department had no written policy in effect on the use of the 12-gauge beanbag round, and there was no policy on how, when, who or what

training was required for the use of the weapon, and the weapon had never been deployed in the field previously. (ER-88-95). Plaintiff's expert, Peter A. Reedy, a 24-year member of the Sacramento Police Department, 20 years as a Sergeant, filed a Declaration in opposition to the motion for summary judgment, and stated in part: "The effective resolution of a Critical Incident can often be traced back to successful or unsuccessful communications; communication between the police and the subject, and also communication between the police themselves, relatives, neighbors, co-workers, media and other community and police resources. The police report on the subject incident reflects that Sergeant Johnson requested Deputy Rutherford to come to the scene with his "less lethal" capable shotgun. However, the reports reflect no communication directing Rutherford to approach Deorle and shoot him. If there was no communication regarding this incident on the part of Deputy Rutherford, then he (an assistant team leader of the SIRT Unit) was acting independent of the SIRT Unit and was acting on his own. If there was some type of communication between Rutherford and the Incident Commander Estes, it was not part of any plan and it was not communicated to all units on the scene. The lack of communication is demonstrated by Deputy Doug Smith leaving an important position on the perimeter. In addition, one of the SIRT officers had staged his men 7/10ths of a mile from the scene with knowledge that Lieutenant Estes was handling the incident and had no experience or training in Critical Incident Management. Lieutenant Smith thereby nullified his ability to communicate with Lieutenant Estes and provide his training and experience to an effective handling of the situation. It appears that there was no communication between officers

at one intersection with another group of officers at the opposite intersection."

In Paragraph "j" of his Declaration, Expert Reedy stated:

> "The use of the shotgun, beanbag round, was an unreasonable use of force upon the person of Richard Deorle and resulted in the loss of his left eye. The Use of Force Continuum, as used in California, would list an impact weapon high on the schedule of force. The beanbag round is described as a 'long range impact weapon.' It would be unreasonable for an officer to use an impact weapon on an unarmed person. The unreasonableness of this act is magnified by the facts that: (i) the distance between the shooter and the unarmed person was more than 30 feet away; (ii) there were no immediate threats to anyone; (iii) the shotgun was used by an independently operating SIRT deputy; all part of no organized 'force.' An impact weapon can be used in self defense, in defense of others and to ward off an attack. The use of the 12-gauge beanbag round in this incident was an unreasonable deployment of force. The use of a hand baton would not have been allowed in this case." (ER-88-95).

In a study contained in the Journal of the International Wound Ballistics Association, Volume 4, Fall 2000, Number 4, Wound Ballistics Review, it reports that:

> "The head and neck are vulnerable to fatal blunt trauma from any configuration beanbag impact, and the need to avoid impacts in these areas is well known. Impacts in the head and neck should always be unintended and while the need to avoid these impacts is a factor in user tactics and training, these impacts are not bean

> bag configuration discriminators. All vulnerable body areas that should also be unintended targets but those that dominate fatal wound trauma risk are sensitive to beanbag configuration and have occurred more often."

After 768 deployments of bean bag rounds, the Wound Ballistic Review reported 8 fatalities, 14 penetrations and 27 fractures. *Id.* At page 11. The reported conclusion included the statement: "Second, *in the current sample*, fatal injuries are far more likely when projectiles strike the neck and chest as compared to other areas; 16.7% of the projectiles striking citizens in the neck and 3.4% of those striking the chest produced fatal wounds, while 0% of those striking other areas did." *Id.* at page 13.

REASONS TO DENY THE PETITION FOR WRIT OF CERTIORARI

I

The Acquisition Of Weapons By Police That Maim And Occasionally Kill Does Not Require A Change In The Well-Settled Rule That Unreasonably Applied Excessive Force Disqualifies An Officer From Qualified Immunity.

The Ninth Circuit observed in Appendix to Petition for Writ of Certiorari, page 53, footnote 13: "The appellees also called the cloth-cased shot a 'beanbag' round. That euphemism grossly underrates the dangerousness of this projectile. The round is not some sort of 'hackey-sack.' It is a projectile capable of inflicting serious injury or death, rather than some children's toy."

Taking into consideration the fact that the beanbag round is fired from a 12-gauge shotgun, propelled by an

explosion of gun powder, it seems, both through reported testing and actual practice experience of Deputy Rutherford, to follow a course of its own, and makes for a very dangerous and all to often deadly weapon. The repetition of the mantra contained in the Petition for Writ of Certiorari by the Petitioners using the phrase "non-deadly force" and on a "dangerous individual" certainly mischaracterizes the scene and the implements applied in this case. In fact, even when the round was fired into Deorle's eye socket, several officers reported hearing someone shouting identifying the round that had been fired as "less lethal." It is only in the appellate environment that creative counsel have transformed a dangerous, potentially deadly device into a "non-lethal" weapon.

How was it that prior to Deputy Rutherford's arrival, no other deputies had applied any force to Deorle? They had observed reluctant compliance with their commands and recognized Deorle as in a mental crisis and a danger only to himself. As this Court stated in *Tennessee v. Garner* 471 U.S. 1, 105 S.Ct. 1694 (1985):

> "This case requires us to determine the constitutionality of the use of deadly force to prevent the escape of an apparent unarmed suspected felon. We conclude that such force may not be used unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others."
>
> "The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable". . . . "A police officer may not seize an unarmed, nondangerous suspect by shooting him dead." *Id.* at page 1701.

Petitioners contend that the Ninth Circuit misapplied or ignored the *Saucier v. Katz,* 533 U.S. 194, 121 S.Ct. 2151 (2001) decision and *Graham v. Connor,* 490 U.S. 386, 109 S.Ct. 1865 (1989). Such is not the case in that the appellate panel cited *Saucier v. Katz* and proceeded under the *Katz* analysis. In the concluding paragraph of the *Saucier v. Katz* opinion, this Court stated: "Our conclusion is confirmed by the uncontested fact that the force was not so excessive that respondent suffered hurt or injury. On these premises, petitioner was entitled to qualified immunity, and the suit should have been dismissed at an early stage in the proceedings."

The Ninth Circuit panel, in its summary of its application of the *Katz* test stated:

> "Here, the test is not simply a reiteration of the *Graham* test which we applied above: rather, we must determine whether, in using excessive force, the officer made a 'reasonable mistake as to the legality of his actions.' *Katz,* 121 S.Ct. at 2158. We assume, *arguendo*, that Rutherford thought the force he used was not excessive; however, that is not the issue. Rather, the question is whether Rutherford's use of force was premised on a *reasonable* belief that such force was lawful, or, as the Supreme Court recently put it: 'whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.' *Id.* at 2156. The Court also explained the purpose of the rule: 'Qualified immunity operates . . . to protect officers from the sometimes hazy border between excessive and acceptable force.' *Id.* at page 2158. It helps, therefore, to begin our discussion with the observation that, on the basis of the facts we have discussed, this is by no means a borderline case. It

should have been clear to any reasonable officer that, under the circumstances present, firing at Deorle was objectively unreasonable.

Every police officer should know that it is objectively unreasonable to shoot – even with lead shot wrapped in a cloth case – an unarmed man who has committed no serious offense, is mentally or emotionally disturbed, and has been given no warning of the imminent use of such a significant degree of force, poses no risk of flight, and presents no objectively reasonable threat to the safety of the officer or other individuals. Here, all those factors were present. Deorle had complied with the police officers' instructions, had discarded his potential weapons whenever asked to do so, and had not assaulted anyone; in addition, a team of negotiators essential to resolving such situations was en route.

Although there is no prior case prohibiting the use of this specific type of force in precisely the circumstances here involved, that is insufficient to entitle Rutherford to qualified immunity. Notwithstanding the absence of direct precedent, the law may be, as it was here, clearly established. *See DeBoer v. Pennington,* 206 F.3d 857, 864-865 (9th Cir. 2000). Otherwise, officers would escape responsibility for the most egregious forms of conduct simply because there was no case on all fours prohibiting that particular manifestation of unconstitutional conduct. When 'the defendant's conduct is so patently violative of the constitutional right that reasonable officials would know without guidance from the courts that the action was unconstitutional, closely analogous pre-existing case law is not required to show that the law is clearly established.' *DeBoer,* 206 F.3d at 864-865. This is such

> a case. No reasonable officer could have believed that Rutherford's action in shooting Deorle with the 'less lethal' lead-filled beanbag round was appropriate or lawful. To the contrary, 'it would be clear to a reasonable officer that [Rutherford's] conduct was unlawful.' *Katz,* 121 S.Ct. at 2158. Given all the circumstances, the error in judgment, such as it was, does not constitute a 'reasonable mistake' of fact or law on Rutherford's part. Viewing the facts in the light most favorable to the plaintiff, Rutherford was not entitled to qualified immunity for his use of excessive force."

II

Use Of Deadly Force On An Unarmed Man Who Has Committed No Serious Crime, Who Poses No Immediate Threat To Officers Or Others And Who Is Passively Resisting Arrest, Is Manifestly Unreasonable.

This issue is discussed in Paragraph I above.

III

Courts Must, In Motion For Summary Judgment, Look To The Objective Evidence And Not Be Influenced By An Officer's Expression Of An Intent Other Than That Manifested By The Physical Evidence.

In *Graham v. Connor* 490 U.S. 386, 109 S.Ct. 1865 (1989), this Court held:

> "Because 'the test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application' . . . however,

its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight. . . . "

"The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than the 20-20 vision of hindsight."

"An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional." *Id.* at 1872

IV

The Petitioners' Claim Of The Ninth Circuit's *Deorle* Decision Being Out of Line With Other Circuits Lacks Substance.

In a deadly force case, the Third Circuit ruled that:

"[I]n evaluating the objective reasonableness of the use of force, the Court is not limited to consideration of the precise moment of the shooting. The Court disagreed with decisions that exclude any evidence of events preceding the use of force. Such a rigid rule is inconsistent with the Supreme Court's direction that Courts consider the totality of the circumstances. A totality of the circumstances approach cannot automatically exclude 'all context and causes prior to the moment the seizure is finally accomplished. . . . How is the reasonableness of a bullet striking

someone to be assessed if not by examining preceding events?' In the instant case, all events that transpired during the officer's pursuit of the deceased were relevant. The Court stressed that not all events preceding the shooting will always be relevant; some may have too attenuated a connection to the use of force under ordinary concepts of causation. The Circuit Court also expressed agreement with the Ninth Circuit that Courts should be cautious about granting summary judgment to the officer in deadly force cases, because the only witness most likely to contradict the officer's version is now deceased. (*Scott v. Henrich,* 39 F.3d 912 (9th Cir. 1994))." *Abraham v. Raso,* 183 F.3d 279, 291-292 (3rd Cir. 1999).

The Fourth Circuit held that:

"It was clearly established in 1995 that it is objectively unreasonable for a police officer to fail to give a verbal warning before releasing a police dog to seize someone. Release of a police dog into a home works a seizure, even when the dog bites an individual who turns out to be a nonsuspect. 'By giving the command "find him", Officer Sims intended the dog to find anyone in the house' and bite that person. There was a factual dispute about whether the officer gave a warning before sending the police dog into the house. The fact that Plaintiffs claimed that they 'heard no such warning' was enough for Plaintiffs to survive summary judgment on the issue of whether a warning was given. 'A juror could reasonably conclude that if certain witnesses did not hear a warning then no warning was given even if other witnesses testified to a warning.'" *Vathekan v.*

Prince George's County, 154 F.3d 173, 175-180 (4th Cir. 1998).

In *Gutierrez v. San Antonio,* 139 F.3d 441, 446-447 (5th Cir. 1998), the Complaint alleged that the decedent died after being "hog-tied" by the police. The Fifth Circuit found that disputed material issues of fact precluded determination on summary judgment of whether the police officers acted in an objectively reasonable manner. The Court observed that since the Supreme Court's decision in *Tennessee v. Garner*, lower courts have "struggled with whether to characterize various police tools and instruments as 'deadly force'. . . . Courts have generally described 'deadly force' as force carrying with it substantial risk of 'causing death or serious bodily harm.'" There were material issues of fact concerning whether "hog-tying" the deceased constituted the use of deadly force and whether the use of deadly force was objectively reasonable. The mere fact that the Defendants produced an expert opinion that their actions were reasonable did not mean that they were entitled to summary judgment. "An expert's opinion does not establish reasonableness as a matter of law, especially when directly contradicted by another expert's well-supported opinion."

Under California Penal Code Section 12001(b):

> "As used in this title, 'firearm' means any device, designed to be used as a weapon, from which is expelled through a barrel a projectile by the force of any explosion or other form of combustion."

Rutherford failed to warn Deorle prior to shooting him. Petitioners argue that the Petition should be granted because the Ninth Circuit decision is not aligned with

other Circuits. The giving of a warning is not a new or novel idea in light of *Abraham v. Raso, supra.*

CONCLUSION

The officer's intent to aim at a different part of Deorle's body is of no consequence here in view of the fact that the reality is that he shot Deorle in the head and, by his own admission, Officer Rutherford considered such a head shot to be the use of deadly force. Deorle was not an immediate threat to anybody at the time he was shot, and the application of deadly force to his person would be manifestly unreasonable. Rutherford was not, under any test by this Court, entitled to qualified immunity. Whether Rutherford aimed at the head of Deorle, or acted recklessly by shooting a device that had proved unreliable in trials, or intended to fire at Deorle's abdomen; are all questions of fact for a jury.

Nor have the Petitioners been able to cite any cases that differ in any of the Districts. The compliance of the Districts with the Supreme Court's mandate for the application of deadly force to an unarmed nondangerous person, is uniform. It is only by characterizing Deorle as a dangerous, threatening individual and characterizing the weapon used on Deorle as "non-deadly" that Petitioners can seriously contend for the attention of this Court. Since no one but counsel for the Petitioners has characterized the weapon used in this case as "non-deadly", the invention of counsel should not be permitted as a means for a hearing before this Court.

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Dated: May, 2002

Respectfully submitted,

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(4)

No. 01-1245

Supreme Court, U.S.
FILED

MAY 24 2002

CLERK

In The

SUPREME COURT OF THE UNITED STATES

GREG RUTHERFORD, Butte County
Sheriff's Deputy, MICK GREY, Butte County Sheriff,
and COUNTY OF BUTTE,
Petitioners,
vs.

RICHARD LEO DEORLE
Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

REPLY OF PETITIONERS

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6 pgs

In the Response to Petition for Writ of Certiorari, Respondent refers to a number of facts which are not relevant to the determination of whether the use of non-lethal force was reasonable in this case. Respondent's recitation to the factual record is based on the incorrect assumption that the shooting of the beanbag round by Deputy Rutherford was deadly force. In this case, although the standard of review requires the facts be taken in the light most favorable to the Respondent, the use of non-lethal force in the shooting of a beanbag round by Deputy Rutherford is reviewed based upon the facts and circumstances known to that peace officer, including reasonably trustworthy information provided to him. Petitioners respectfully submit that the Petition accurately reflects all of the undisputed evidence of what was known by Deputy Rutherford leading up to and including his decision to shoot a beanbag round at Respondent to allow for this Court to properly determine whether this Petition should be granted. Petitioners hereby respond to the points raised in Respondent's Response to the Petition for Writ of Certiorari.

Respondent asserts that the shooting of the beanbag round in this case was a use of deadly force. However, the majority panel of the Ninth Circuit found that the use of the beanbag round was not deadly force. Significantly, Respondent does not dispute that the law regarding whether the shooting of a beanbag round at a suspect constituted non-deadly or deadly force was not clearly established at the time of the subject incident in September, 1996. See, e.g., Omdahl v. Lindholm, 170 F.3d 730 (7th Cir. 1999). The lack of any clearly established law in this area was pointed out in the recent case of Bell v. Irwin, 2002 U.S. Dist. LEXIS 7967 (S.D. Ill. May 2, 2002). In Bell, the district court noted that the only case from a Court of Appeal regarding the use of beanbag rounds against an individual was Omdahl and that "no reasonable officer would take the Omdahl decision to mean anything definitive about when beanbag rounds, whether deadly or not, are appropriate." Id. at *23. Thus, Respondent incorrectly asserts that the use of a beanbag round is deadly force and fails to cite to any specific case law which would support such a theory. Moreover, the existing case law clearly supports the application of qualified immunity in favor of Deputy Rutherford since the law regarding the use of beanbag rounds was not clearly established in September, 1996.

In addition, Respondent does not contest that the opinion by Judge Reinhardt adopted an incorrect legal standard in applying the narrow exception to the requirement that a factually analogous case must exist in order to find that the law is clearly established to overcome qualified immunity. Clearly, that narrow exception is limited to cases in which the conduct of a state actor is so egregious that it would be a patently obvious violation of a constitutional right. See, e.g., United States v. Lanier, 520 U.S. 259, 271, 117 S.Ct. 1219, 1227-1228 (1997). Respondent also fails to dispute that there is a conflict of law between the Circuit Courts of Appeal regarding the legal standard to be applied with respect to that narrow exception. See Morrell v. Mock, 270 F.3d 1090, 1100-1101 (7th Cir. 2001); Vaughn v. Cox, 264 F.3d 1027, 1036 (11th Cir. 2001); Willingham v. Loughman, 261 F.3d 1178, 1188 n.14 (11th Cir. 2001); Preister v. City of Riviera Beach, 208 F.3d 919, 926-27 (11th Cir. 2000); Castell v. Pieschek, 3 F.3d 1050, 1053 (7th Cir. 1993). Rather, Respondent merely quotes from a large portion of the Ninth Circuit opinion such that it must have properly analyzed Saucier.[1] In fact, that quote reinforces the conclusory application of the narrow exception by the Ninth Circuit while conceding that it found there was no closely analogous case law.

Respondent also submits the failure to give a warning to Deorle prior to the deployment of the beanbag round was properly analyzed by the Ninth Circuit Court of Appeal because the giving of a warning is not a new or novel idea. The majority opinion did not cite to any case which held that a warning was required before the use of non-lethal force prior to September, 1996. App. at p. 16 citing Brewer v. City of Napa, 210 F.3d 1093 (9th Cir. 2000). The only other case involving non-lethal force relied upon by Respondent, Vathekan v. Prince George's County, 154 F.3d 173 (4th Cir. 1998), was also decided after the incident in this case. Moreover, those cases dealt with the release of a police dog to seize a suspect who is not in the immediate presence of the officer. Thus, those cases are not factually analogous, nor do they hold that a warning is required prior to the use of non-lethal force, such as the use of the beanbag

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[1] Respondent quoted from the First Amended Opinion of the Ninth Circuit which was later altered with new citations in the Second Amended Opinion. Compare Response to Petition at pp.9-10 with App. at 19-20.

round in this case. Therefore, the law regarding whether a warning is required with respect to the use of non-lethal force, and in particular the use of a beanbag round, was not clearly established in September, 1996. The only other cases relied upon by Respondent involve the use of deadly force which, as indicated above, do not apply to this case.

Respondent has not made any attempt to reconcile the new legal standards to be used in analyzing a use of excessive force case under the Fourth Amendment adopted in this case with the requirement that the law be clearly established in order to overcome qualified immunity. The majority opinion by the Ninth Circuit in this case adopts new factors to be considered and legal standards to be used in analyzing a claim for use of excessive force under the Fourth Amendment. Those factors and standards include (1) that there be a strong governmental interest if the force used may lead to serious injury; (2) that the court may look to the injury sustained to support an inference of excessive force[2]; (3) that the peace officer should have considered alternative types of force; and (4) that a peace officer should consider a mentally ill individual less dangerous. First, there is no case law which addresses those factors and standards prior to September, 1996. Rather, these standards were evolving, if at all, based on case law rendered in 2000. See Headwaters v. County of Humboldt ("Headwaters I") 240 F.3d 1185 (9th Cir. 2000). Moreover, these type of factors require an after-the-fact or hindsight analysis which was rejected by this Court in Graham v. Connor, 490 U.S. 386, 109 S.Ct. 1865 (1989). Furthermore, while the Court of Appeal may have found it necessary to set forth these principles to support a basis for a subsequent holding that a right is clearly established in accordance with this Court's directive in Saucier, certainly the law cannot be considered to be clearly established regarding the conduct of Deputy Rutherford in this case.

Petitioners respectfully submit that the majority opinion of the Ninth Circuit in this case has created a conflict amongst the

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[2] See also Santos v. Gates, 287 F.3d 846, *17-*21 (9th Cir. 2002) (petition for rehearing and rehearing en banc pending) (serious injury is evidence of excessive force). Santos, at *36-37 (Tallman, J. dissenting, criticizing reliance by majority on injury to support finding of excessive force).

Circuits regarding the application of the narrow "patently obvious" exception to the requirement that there be factually analogous case law to overcome qualified immunity. The majority opinion in this case will enable courts to circumvent the holding of Saucier by deeming any use of force a patently obvious violation of the Fourth Amendment. This case involved the use of new technology which has not been analyzed in any reported case. This alternative non-lethal weapon was used for the protection of the officer and others against an oncoming, intoxicated, threatening, armed and dangerous individual. The majority opinion concedes that there was no factually analogous case law and contrary to this Court's holding in Saucier refused to grant qualified immunity to Deputy Rutherford. Without the review of this Court, the denial of qualified immunity to Deputy Rutherford will have unfortunate result of deterring the evolution of safer police tactics.

Petitioners have established important reasons why review is warranted in this case. The undisputed evidence establishes that Deputy Rutherford did not violate the constitutional right of Deorle to be free from excessive force and review is appropriate to reestablish the Graham analysis without the inclusion of new or additional factors. Review is warranted to clarify the application of the narrow exception to qualified immunity which is reserved for patently obvious violations which require no factually analogous case law in order to determine that the law was clearly established. Review is also necessary to resolve the conflict between the Ninth Circuit and this Court's opinion in Saucier as well as the opinions of other Circuit Courts of Appeal regarding the legal standard used to determine when the narrow "patently obvious" exception should apply in the context of whether the law is clearly established. Lastly, review is appropriate to clarify the application of qualified immunity in this case where the Court of Appeal adopts new factors and legal standards to be considered in analyzing a claim for use of excessive force under the Fourth Amendment and at the same time determines that law at the time of this incident was clearly established so as to deprive a peace officer of qualified immunity.

Wherefore, Petitioners respectfully request that this Petition for a Writ of Certiorari be granted.

Dated: May 23, 2002

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